No. 06-549
Vide 06-340

(35)

Title: Environmental Protection Agency, Petitioner
v.
Defenders of Wildlife, et al.

Docketed: October 23, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-71439, 03-72894)
Decision Date: August 22, 2005
Rehearing Denied: June 8, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 25 2006	Application (06A223) to extend the time to file a petition for a writ of certiorari from September 6, 2006 to October 6, 2006, submitted to Justice Kennedy.
Aug 30 2006	Application (06A223) granted by Justice Kennedy extending the time to file until October 6, 2006.
Sep 26 2006	Application (06A223) to extend further the time from October 6, 2006 to October 23, 2006, submitted to Justice Kennedy.
Sep 27 2006	Application (06A223) granted by Justice Kennedy extending the time to file until October 23, 2006.
Oct 23 2006	Petition for a writ of certiorari filed. (Response due November 22, 2006)
Oct 23 2006	Appendix of Environmental Protection Agency filed.
Nov 2 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents. VIDED.
Nov 9 2006	Brief amicus curiae of Federal Water Quality Coalition filed. VIDED.
Nov 9 2006	Waiver of right of respondents National Association of Home Builders, et al. to respond filed.
Nov 20 2006	Brief amicus curiae of American Farm Bureau Federation filed. VIDED.
Nov 21 2006	Brief amicus curiae of Alaska filed. VIDED.
Nov 22 2006	Brief amici curiae of Arizona Power Authority, et al. filed. VIDED.
Nov 22 2006	Brief amici curiae of Nebraska, et al. filed.
Nov 22 2006	Brief of respondents Defenders of Wildlife, et al. in opposition filed. VIDED.
Dec 6 2006	DISTRIBUTED for Conference of January 5, 2007.
Dec 11 2006	Reply of petitioner Environmental Protection Agency filed. (Distributed)
Jan 5 2007	Petition GRANTED The petition for a writ of certiorari in No. 06-340 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are requested to brief and argue on the following question: "Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, see 33 U. S. C. Sec. 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973, 16 U. S. C. Sec. 1536 (a)(2); and, if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2)."
Feb 5 2007	SET FOR ARGUMENT Tueasday, April 17, 2007.

Feb 5 2007	Consent to the filing of amicus curiae briefs in support of either party received from counsel for the respondents. VIDED.
Feb 16 2007	Record received from U.S.C.A. for 9th Circuit. (1 box)
Feb 19 2007	Brief amici curiae of Nebraska, et al. filed. VIDED.
Feb 20 2007	Joint appendix filed. VIDED.
Feb 20 2007	Brief amicus curiae of National Association of Clean Water Agencies filed. VIDED.
Feb 20 2007	Brief of petitioners in 06-340 National Association of Home Builders, et al. filed. VIDED.
Feb 20 2007	Brief of petitioner Environmental Protection Agency filed. VIDED.
Feb 20 2007	Brief amicus curiae of Federal Water Quality Coalition filed. VIDED.
Feb 20 2007	Brief amici curiae of American Road and Transportation Buildiers Association, et al. filed. VIDED.
Feb 20 2007	Brief amicus curiae of CropLife America filed. VIDED.
Feb 20 2007	Brief amicus curiae of American Farm Bureau Federation filed. VIDED.
Feb 20 2007	Brief amici curiae of Association of California Water Agencies, et al. filed. VIDED.
Feb 20 2007	Brief amicus curiae of Mountain States Legal Foundation filed. VIDED.
Feb 20 2007	Brief amici curiae of National Hydropower Association, et al. filed. VIDED.
Feb 20 2007	Brief amici curiae of Arizona Power Authority, et al. filed. VIDED.
Feb 20 2007	Brief amicus curiae of High Production Homebuilders filed. VIDED.
Feb 20 2007	Brief amicus curiae of Western Urban Water Coalition filed. VIDED.
Feb 20 2007	Brief amici curiae of Washington Legal Foundation, et aL. filed. VIDED.
Feb 20 2007	Brief of respondent Arizona in support filed. VIDED.
Feb 20 2007	Brief amici curiae of Kern County Water Agency, et al. filed.
Mar 2 2007	CIRCULATED.
Mar 23 2007	Motion for divided argument filed by respondents National Association of Home Builders, et al. VIDED.
Mar 27 2007	Brief of respondents Defenders of Wildlife, et al. filed. VIDED. (Distributed)
Mar 27 2007	Brief amici curiae of American Fisheries Society, et al. filed. VIDED. (Distributed)
Mar 27 2007	Brief amici curiae of American Bird Conservancy, et al. filed. VIDED. (Distributed)
Mar 27 2007	Brief amici curiae of Jared Diamond, et al. filed. VIDED. (Distributed)
Apr 2 2007	Motion for divided argument filed by petitioner DENIED.
Apr 9 2007	Reply of petitioners National Association of Home Builders, et al. filed. VIDED. (Distributed)
Apr 10 2007	Reply of petitioner Environmental Protection Agency filed. (Distributed) VIDED.
Apr 10 2007	Reply of respondent Arizona filed. VIDED. (Distributed)
Apr 11 2007	Administrative record received from U.S. DOJ. (1 box

Supreme Court, U.S.
FILED
06-549 OCT 23 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

PARTIES TO THE PROCEEDINGS

The United States Environmental Protection Agency is the petitioner in this Court and was a respondent in the court of appeals.

The following parties are respondents in this Court and were petitioners in the court of appeals: Defenders of Wildlife, Center for Biological Diversity, and Craig Miller.

The following parties are respondents in this Court and were intervenors in the court of appeals: National Association of Home Builders, State of Arizona, and Arizona Chamber of Commerce.

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In the Supreme Court of the United States

No.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-67a) is reported at 420 F.3d 946.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2005. Petitions for rehearing were denied on June 8, 2006 (App. 68a-69a). On August 30, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 6, 2006. On September 27, 2006, Justice Kennedy further extended the time to and including October 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7(a)-(b) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)-(b), and Section 402(b) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1342(b), are reproduced in the appendix to this petition (App. 117a-124a).

STATEMENT

1. The Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. 1251(a)). Under the CWA, the National Pollutant Discharge Elimination System (NPDES) is administered by EPA unless and until authority to administer the program within a particular State is transferred to state officials. The Act provides that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. 1342(b). The CWA further states that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Ibid.*; see 33 U.S.C. 1342(b)(1)-(9). Section 402(b) thus prescribes "a system for the mandatory approval of a conforming State program." *Shell Oil Co.* v. *Train*, 585 F.2d 408, 410 (9th Cir. 1978). After NPDES permitting authority has been transferred to state officials, EPA can object to a state-issued permit only if it is "outside the guidelines and requirements" of the CWA. 33 U.S.C. 1342(d)(2).

2. Congress enacted the Endangered Species Act of 1973 (ESA) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress

directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533 (2000 & Supp. IV 2004). The Fish and Wildlife Service (FWS) implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. 17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the Act with respect to species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.101(a), 223.102.

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Section 7(b)(3)(A) states that, once the consultation process has been completed, "the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. 1536(b)(3)(A). Section 7(b)(3)(A) further provides that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of [Section 7] and can be taken by the Federal agency * * * in implementing the agency action." 16 U.S.C. 1536(b)(3)(A).

Regulations promulgated jointly by the Secretaries of Commerce and the Interior furnish a structure for consultation concerning the likely effects on listed species of proposed federal actions. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b) and (c). *Inter alia*, the regulations establish a process of "formal consultation," see 50 C.F.R. 402.14, which culminates in the issuance of a biological opinion (BiOp), see 50 C.F.R. 402.14(h), that includes a "detailed discussion of the effects of the action on listed species or critical habitat," 50 C.F.R. 402.14(h)(2). The

term "effects of the action" is defined to include "indirect effects," *i.e.*, "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. 402.02. The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

3. In January 2002, Arizona officials requested EPA's authorization to administer the NPDES program in that State. App. 7a. In June 2002, EPA announced that it had initiated consultation with FWS pursuant to Section 7(a)(2) of the ESA. See 67 Fed. Reg. 49,919 (2002). During the consultation process, FWS staff expressed concern that the transfer of NPDES authority might have indirect effects on species listed under the ESA. That concern was grounded in the fact that, whereas EPA itself would be required by Section 7(a)(2) to consult with FWS in order to assess the likely effects on listed species of individual permitting decisions under the CWA, Arizona officials would be under no similar obligation, since Section 7(a)(2) of the ESA applies only to federal agency action. See C.A. App. 116-117.[1]

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[1] The focus of FWS field staff's concern was not that discharges permitted by the State after a transfer of authority would cause adverse impacts on water quality that in turn would jeopardize listed species. FWS agreed with EPA that the proposed transfer of authority was unlikely to have that effect. Rather, FWS field staff's concern was that the development associated with such discharges might harm certain terrestrial species. Because large-scale development could not as a practical matter go forward without CWA discharge permits, EPA in its own administration of the CWA would treat the impacts of associated development as impacts of the relevant CWA permits. EPA staff pointed out, however, that if authority over the NPDES program in Arizona was transferred to state officials, EPA would lack the power to object to state permits based on such *non*-water-quality-related impacts on listed species. EPA further stated that the transfer of authority could not properly be regarded as the cause of adverse impacts to terrestrial species, both because the link between the two is speculative and attenuated as a factual matter, and because the CWA directs EPA to approve a State's application to assume administration of the NPDES program if the criteria in Section 402(b) of the CWA are met. FWS staff, by contrast, took the position that the consultation

On December 3, 2002, FWS issued its BiOp, which concluded that the requested transfer of NPDES permitting authority would not cause jeopardy to listed species. C.A. App. 204-231. FWS stated that, "[a]fter further reflection and analysis of causation and the definition of indirect effects found in our Consultation Handbook, our final opinion is that the loss of section 7-related conservation benefits is not an indirect effect of the approval action." *Id.* at 223. FWS explained, *inter alia*, that the

> loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Id. at 224. FWS also concluded that, even if the effects of the transfer on listed species could properly be attributed to EPA, other mechanisms were sufficient to support the conclusion that the transfer of NPDES permitting authority was not likely to jeopardize a listed species or adversely modify critical habitat. See *id.* at 217-221.

After FWS issued the BiOp, EPA approved the transfer of permitting authority to Arizona. C.A. App. 232; see 67 Fed. Reg. at 79,629. EPA found that Arizona's application met each of the criteria for program approval specified in Section 402(b) of the CWA. C.A. App. 258.

4. Defenders of Wildlife and other organizations filed a petition for review in the court of appeals, contending that EPA had acted arbitrarily and capriciously by approving Arizona's

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process must include an assessment of indirect effects that FWS believed the transfer would have on terrestrial species. C.A. App. 117. Pursuant to procedures set forth in a pre-existing Memorandum of Agreement, that interagency dispute was elevated for resolution at higher levels within the agencies. See *id.* at 116.

request for authority to administer the NPDES program. The court of appeals granted the petition for review. App. 1a-67a.

a. The court of appeals first held that EPA's approval of Arizona's transfer application was arbitrary and capricious because EPA had "relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." App. 23a; see App. 23a-28a. The court explained that, although EPA had construed Section 7 of the ESA as requiring it to consult with FWS concerning the effect on listed species of the proposed transfer of permitting authority, FWS's no-jeopardy opinion was based in part on the premise that EPA cannot deny a transfer application under Section 402(b) of the CWA based on ESA concerns if the CWA criteria are satisfied. See App. 23a-26a. The court concluded that EPA's approval of the transfer application "was not the result of reasoned decision-making" because "the two propositions that underlie the EPA's action—that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true." App. 26a-26a. The court stated that it was therefore required to "remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." App. 28a.

b. Rather than, in fact, remanding the case on that ground, however, the court of appeals went on to hold that EPA had both the power and the duty under the ESA to determine whether transfer of NPDES permitting authority to state officials would jeopardize listed species, and to deny a transfer application if it found jeopardy to be likely, even though it is undisputed in this case that the State of Arizona had satisfied the criteria (see 33 U.S.C. 1342(b)(1)-(9)) that trigger the requirement in 33 U.S.C. 1342(b) that EPA "shall" approve a State's transfer application. App. 28a-48a; see App. 31a n.11. That holding was grounded in the court's view that Section 7 of the ESA provides an

"affirmative grant of authority to attend to protection of listed species," over and above whatever obligations federal agencies may have under their own governing statutes. App. 34a; see App. 38a-39a. The court found that authority to be unaffected by the CWA's directive that EPA "shall approve" state applications that satisfy the criteria set forth in 33 U.S.C. 1342(b). See App. 40a. The court of appeals also rejected the contention, advanced by non-federal parties who had intervened in support of EPA, that EPA's approval of the State's transfer application was not subject to Section 7 of the ESA because it was not a "discretionary" action within the meaning of 50 C.F.R. 402.03. See App. 40a-44a. The court construed that regulation's reference to "discretionary" action to encompass all agency actions that are "authorized, funded, or carried out" by the agency. App. 43a (quoting 16 U.S.C. 1536(a)(2)).[2]

The court of appeals acknowledged that its conclusion that Section 7(a)(2)'s obligations are triggered in this case even though Section 402(b) of the CWA mandates approval of a transfer application conflicts with decisions of two other courts of appeals. See App. 44a-47a (citing *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (5th Cir. 1998), and *Platte River Whooping Crane Habitat Maint. Trust* v. *FERC*, 962 F.2d 27 (D.C. Cir. 1992)). The court believed, however, that its holding was supported by Ninth Circuit precedent and decisions of two other courts of appeals. App. 42a-43a, 44a-46a, 47a-48a.[3]

c. Judge Thompson dissented, relying on 50 C.F.R. 402.03 and on an array of Ninth Circuit precedents holding that Section

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[2] The court of appeals reached that conclusion on an important question of law despite the government's repeated request to have the opportunity for additional briefing on the question should the court, contrary to the suggestion of the government, decide to reach the issue. See App. 43a n.19.

[3] The court of appeals also held that the other bases for FWS's no-jeopardy conclusion did not adequately support EPA's decision to approve the transfer of permitting authority. App. 48a-61a.

7(a)(2) of the ESA does not encompass agency conduct as to which the agency lacks discretion. See App. 63a-67a. Judge Thompson explained:

> Here, the EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not "agency action" within the meaning of section 7 of the Endangered Species Act. The Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements, the EPA administrator "shall approve" the program. 33 U.S.C. § 1342(b). This Congressional directive does not permit the EPA to impose additional conditions.

App. 65a-66a. Judge Thompson concluded that, because "[t]he EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary," the petition for review should be denied. App. 67a.

d. The court of appeals denied rehearing and rehearing en banc, with six judges dissenting. App. 68a. Judge Kozinski, writing for the dissenting judges, observed that, "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." App. 78a n.4. The dissenting judges also explained that the Ninth Circuit's decision conflicts with rulings of two other courts of appeals, which have held that the ESA does not expand the powers of federal agencies or supersede contrary statutory mandates, but simply directs agencies' exercise of existing discretionary authority. See App. 79a-81a (citing *American Forest & Paper Ass'n* v. *EPA*, *supra*, and *Platte River Whooping Crane Trust* v. *FERC*, *supra*).

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA can operate to preclude agency conduct that is mandated by another Act of Congress. The Ninth Circuit answered that question in the affirmative, holding that EPA's approval of Arizona's application for transfer of NPDES authority violated Section 7(a)(2), even though the CWA provides that EPA "shall approve" a transfer application when specified criteria are met, and it was undisputed that those CWA criteria were satisfied here. That ruling is erroneous. Moreover, as both the majority and dissenting judges recognized, the Ninth Circuit's ruling conflicts with decisions of two other courts of appeals, which have properly construed Section 7(a)(2) of the ESA as channeling federal agencies' exercise of their existing discretionary authority, but not as superseding constraints or overriding mandates imposed by other laws. And because Section 7(a)(2) applies to *all* federal agencies, the court of appeals' decision has government-wide significance. Review by this Court is warranted in light of the erroneous nature of the court of appeals' ruling; the square conflict with decisions of other circuits, including in this specific context; and the practical importance of the question presented for all manner of government actors.

1. Section 402(b) of the CWA states in unqualified terms that EPA "shall approve" a State's application to administer the NPDES program "unless" the State fails to satisfy one or more of the nine criteria set forth in the CWA itself. 33 U.S.C. 1342(b); see App. 82a (Kleinfeld, J., dissenting from denial of rehearing en banc) ("The 'shall/unless' formula makes the nine conditions exclusive."). In the instant case, "[n]o party questioned the EPA's determination that Arizona's transfer application met the Clean Water Act factors." App. 31a n.11. The court of appeals nevertheless set aside EPA's approval of Arizona's transfer

application, holding that "Section 7(a)(2) [of the ESA] imposes a duty on the EPA to 'insure' its transfer decision is not likely to jeopardize protected species or adversely modify their habitat," and that EPA had failed adequately to perform that duty. App. 48a; see App. 61a-63a. In practical effect, the court treated Section 7(a)(2) of the ESA as impliedly repealing the CWA's directive that EPA "shall approve" a state transfer application that satisfies the CWA criteria and as effectively imposing a tenth criterion. See App. 78a n.4 (Kozinski, J., dissenting from denial of rehearing en banc).

That holding is erroneous. As this Court has repeatedly recognized, "repeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (citations and internal quotation marks omitted). For the reasons that follow, Section 7(a)(2)'s no-jeopardy and consultation requirements are properly construed to channel the exercise of federal agencies' *existing* discretionary authority, not to override other federal mandates or to require species-protective measures that are forbidden by other federal laws. That reading is particularly appropriate because it avoids unnecessary conflicts between the ESA and other Acts of Congress. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). If Section 7(a)(2) is construed in that manner, its no-jeopardy and consultation requirements are fully consistent with the CWA's directive that EPA "shall approve" any state NPDES transfer application that satisfies the nine specified CWA criteria.

a. Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C.

1536(a)(2). Section 7(a)(2) thus does not impose upon federal agencies any affirmative duty to protect listed species from harms caused by other actors, such as a state permittee. Rather, a federal agency's duty under that provision is simply to ensure that the species is not jeopardized by actions attributable to the agency itself. Where (as here) the conduct that is alleged to cause harm to species is mandated by an Act of Congress, the effect is not properly attributed to the federal agency that simply carries out the statutory directive.

The gravamen of respondents' challenge to the transfer of NPDES authority is that Arizona's permitting regime may be less protective of listed species than is the NPDES program as administered by EPA officials because the State's individual permitting decisions will not be federal agency actions and therefore will not be subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. Acceptance of that position would frustrate Congress's federalism-sensitive judgment to transfer authority to States once the nine criteria are met. And it is clearly that congressional judgment, not any discretionary agency action, that would be the cause of any adverse impact that the transfer might entail.

As FWS explained in its BiOp in this case, any harm to listed species that may result from the challenged transfer is "not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of [Section] 402(b) of the Clean Water Act." C.A. App. 224. FWS thus correctly recognized that Congress's decision to enact the mandatory directive contained in 33 U.S.C. 1342(b), rather than EPA's compliance with that statutory command, is the legal cause of any harm to listed species that the transfer of NPDES permitting authority may entail. FWS

regulations implementing the ESA make clear that an agency is required to take into account only those effects that are "caused" by its actions. See C.A. App. 222-223 (citing 50 C.F.R. 402.02 (defining "indirect effects" as those that are both "caused" by the proposed action and "are later in time, but still are reasonably certain to occur")).

The causation analysis in the FWS BiOp is strongly supported by this Court's subsequent decision in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). The Court in *Public Citizen* held that the National Environmental Policy Act (NEPA) did not require the Federal Motor Carrier Safety Administration (FMCSA) to prepare an Environmental Impact Statement (EIS) assessing the environmental effects of allowing Mexican trucks onto United States roads once the President lifted a prior moratorium on Mexican trucks. The Court explained that "NEPA requires a reasonably close causal relationship between the environmental effect" and the pertinent agency conduct before an EIS must be prepared. *Id.* at 767 (internal quotation marks omitted). The Court further observed that

> FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable * * * requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

Id. at 758-759 (citation and internal quotation marks omitted). In those circumstances, the Court reasoned, "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.* at 769.

Thus, the Court in *Public Citizen* concluded that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. The same principle applies here. Because the CWA forecloses EPA's ability to deny a State's transfer application based on projections of injury to listed species, EPA is not the legal cause of any such harm that may result from activities that are authorized by NPDES permits issued by the State of Arizona after the transfer occurs. Instead, the legally relevant cause is the action of "Congress in * * * limiting [EPA's] discretion," *Public Citizen*, 541 U.S. at 769, by mandating approval of a transfer application that satisfies the criteria in Section 402(b) of the CWA. The agency's approval of Arizona's transfer application therefore cannot properly be said to "jeopardize"—*i.e.*, *cause* jeopardy to—the continued existence of any listed species.[4]

b. Other provisions of the ESA reinforce the conclusion that Section 7(a)(2)'s no-jeopardy and ancillary consultation requirements do not apply to agency conduct that is mandated by another federal statute. Section 2(c) of the ESA reflects Congress's policy judgment that all federal agencies "shall *utilize their authorities* in furtherance of" the statute's purposes. 16 U.S.C. 1531(c)(1) (emphasis added). Section 7(a)(1) similarly provides that agencies "shall * * * *utilize their authorities* in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species." 16 U.S.C. 1536(a)(1) (emphasis added). And Section 7(b)(3)(A), which governs the inter-agency consultation process, states that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he

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[4] Alternatively, EPA's lack of discretion in this area might support a conclusion that EPA's approval of a State's transfer application in accordance with the CWA's command is not an "agency action" within the meaning of Section 7(a)(2) of the ESA. See App. 65a (Thompson, J., dissenting).

believes would not violate [Section 7(a)(2)] and *can be taken by the Federal agency* * * * in implementing the agency action." 16 U.S.C. 1536(b)(3)(A) (emphasis added).[5] The italicized language in each of those provisions reflects Congress's intent that federal agencies' efforts to prevent harm to listed species must be undertaken in conformity with any constraints imposed by other laws.

The court of appeals appeared to recognize that the phrase "utilize their authorities," where it appears in the ESA, reflects Congress's intent that federal agencies should pursue the ESA's objectives only to the extent that they are permitted to do so by other provisions of law. See App. 34a-35a, 46a. The court concluded, however, that because Section 7(a)(2) itself does not contain that phrase or similar limiting language, Section 7(a)(2)'s no-jeopardy mandate supersedes mandatory directives contained in other Acts of Congress. See *ibid.* That conclusion reflects a misunderstanding of the ESA's history.

As originally enacted in 1973, Section 7 of the ESA directed all federal agencies to

> utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for the conservation of endangered species and threatened species * * * and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of [critical] habitat of such species.

ESA, Pub. L. No. 93-205, 87 Stat. 892 (16 U.S.C. 1536 (1976)). As its text just quoted makes clear, in Section 7's original form, the obligations of federal agencies to carry out conservation

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[5] Accord 50 C.F.R. 402.02 (defining reasonable and prudent alternatives as alternatives that, *inter alia*, "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction").

programs (now contained in Section 7(a)(1)) and to avoid jeopardy (now contained in Section 7(a)(2)) were *both* qualified by the phrase "utilize their authorities." Consistent with that limitation, Representative Dingell, the floor manager of the bill in the House of Representatives, explained that the ESA as originally enacted "substantially amplified the obligation of * * * agencies * * * to take steps *within their power* to carry out the purposes of this act." 119 Cong. Rec. 42,913 (1973) (emphasis added). This Court quoted that very statement by Representative Dingell in its seminal ESA decision in *TVA* v. *Hill*, 437 U.S. 153, 183 (1978).

Through amendments enacted in 1978, Section 7 of the ESA was divided into subsections. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3752. Subsection (a) of Section 7, as enacted in those 1978 amendments, contained in two separate sentences substantially the same language as is now set forth in current Subsections 7(a)(1) and (2). As amended in 1978, Section 7(a) provided as follows:

> Consultation.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of [the ESA]. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency' action) does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to

> be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

1978 Amendments, § 3, 92 Stat. 3752.

The Conference Report accompanying the 1978 amendments explained that the new subsection 7(a) "essentially restates section 7 of existing law." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Thus, while the no-jeopardy and ancillary consultation requirements were set forth in a separate sentence that did not repeat the phrase "utilize their authorities" contained in the preceding sentence, the 1978 legislative history indicates that Congress in rewording Section 7 did not seek to expand the scope of federal agencies' no-jeopardy and consultation duties in potentially far-reaching ways, but rather intended to preserve the substance of the requirements in their prior form. Indeed, the court of appeals in this case recognized that "[t]he 1978 amendment did not change section 7's substantive provisions," App. 36a, though the court failed to appreciate the significance of that fact. The clear import of the 1978 amendments therefore is that the obligation of an agency not to jeopardize a listed species remained simply a particular (albeit mandatory) aspect of the more generalized provision in the preceding sentence for agencies to "utilize their authorities" in furtherance of the Act's purposes.

The foregoing history is particularly significant in light of the events that precipitated passage of the 1978 amendments. Those amendments were enacted only a few months after this Court's decision in *TVA* v. *Hill*, *supra*, which construed the ESA to preclude operation of the Tellico Dam in Tennessee. See 437 U.S. at 156-158, 193-195. *Inter alia*, the 1978 amendments softened the practical effect of the decision in *Hill* by creating the Endangered Species Committee, which is authorized to grant exemptions from Section 7(a)(2)'s no-jeopardy mandate, see 1978 Amendments, § 3, 92 Stat. 3753-3760, and by directing the

Committee promptly to determine whether the Tellico Dam and Reservoir Project should be granted an exemption, see *id.* § 5, 92 Stat. 3761. Given that sequence of events, it is most unlikely that Congress chose simultaneously to *expand* the reach of Section 7's no-jeopardy requirement to require an agency to ignore a mandate in another Act of Congress. And it is altogether implausible to suppose that Congress intended to accomplish that result obliquely, by putting the phrase "utilize their authorities" in a separate sentence from Section 7(a)'s no-jeopardy and consultation requirements, without mentioning the change in the legislative history. Cf. *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132-134 (2003) (declining to construe 1986 amendments to the False Claims Act as impliedly removing municipal corporations from the Act's coverage when such a change would have been contrary to the primary thrust of the 1986 legislation).[6]

c. The federal agencies charged with primary responsibility for the administration of the ESA have addressed the application of Section 7(a)(2)'s no-jeopardy and consultation requirements to agency conduct, like EPA's approval of Arizona's transfer application in this case, that is affirmatively mandated by some other provision of law. First, as noted above, a regulatory provision jointly adopted by FWS and NMFS provides that the relevant effects on listed species under Section 7(a)(2) are those "caused" by the agency's own action. 50 C.F.R. 402.02 (defining "effects of the action"). The effects of a statutory mandate are caused by Congress, not by the agency.

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[6] In 1979, Section 7(a) was further divided into subsections (1), (2), and (3). See Act of Dec. 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226. Once again, however, that further subdivision made no substantive change. Accordingly, an agency's duty to "insure" that its actions will not jeopardize a listed species (and to engage in consultation to that end) continues to be limited to measures the agency might take to "utilize [its] authorities" under existing law. The 1979 amendments also added the final sentence of what is now Section 7(a)(2). See *ibid.*

Second, another regulatory provision adopted jointly by FWS and NMFS states that "Section 7 and the requirements of [50 C.F.R. Pt. 402] apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. 402.03 (emphasis added). That rule reflects the longstanding view of FWS and NMFS that Section 7 channels federal agencies' exercise of existing authority and discretion, but does not supersede other legal constraints on agency conduct.

The construction of Section 7 of the ESA that is reflected in 50 C.F.R. 402.02 and 402.03 is reasonable and is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 703 (1995) (*Sweet Home*) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation."). The court of appeals in this case quoted 50 C.F.R. 402.02 and recognized its parallel to the causation standard under NEPA as explained in *Public Citizen*, see App. 30a, but then reached a conclusion flatly contrary to this Court's analysis in *Public Citizen*. As for 50 C.F.R. 402.03, the court of appeals construed its reference to "actions in which there is discretionary Federal involvement or control" to encompass EPA's approval of Arizona's transfer application, on the ground that "EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application," App. 44a, even though EPA did *not* have discretion under the CWA to deny the transfer but was instead compelled to grant Arizona's application once the CWA criteria were satisfied. FWS and NMFS have since confirmed, however, that agency conduct mandated by another Act of Congress is not subject to "discretionary Federal involvement or control" within the meaning of Section 402.03. See pp. 25-26, *infra*; App. 103a-116a.

2. As the court of appeals acknowledged (see App. 44a-45a, 46a-47a; see also App. 79a-81a (Kozinski, J., dissenting from denial of rehearing en banc)), the court's decision in this case conflicts with decisions of two other circuits, which have correctly held that the no-jeopardy requirement of Section 7(a)(2) of the ESA does not apply to agency conduct that is mandated by another federal statute.

a. In *Platte River Whooping Crane Habitat Maintenance Trust* v. *FERC*, 962 F.2d 27 (1992) (*Platte River*), the District of Columbia Circuit held that Section 7 of the ESA did not supersede limitations imposed by the Federal Power Act on the authority of the Federal Energy Regulatory Commission to amend existing licenses. See *id.* at 34. The court explained that the ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Ibid.* The court specifically rejected the contention that *TVA* v. *Hill* supported a more expansive construction of Section 7, noting that this Court's decision in *Hill* "did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA." *Ibid.*; compare App. 32a (court of appeals in this case states that the decision in *Hill* "confirms [the court's] textual interpretation" of Section 7(a)(2)).

b. In *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (1998) (*American Forest*), the Fifth Circuit relied in part on *Platte River* in rejecting the argument that the ESA trumps the mandatory character of the CWA state-transfer provisions or supplants the CWA's criteria for approving transfers of authority. The court in *American Forest* considered the question whether EPA could condition a transfer of NPDES permitting authority to Louisiana on that State's agreement to consult with FWS and/or NMFS regarding impacts or endangered and threatened species before issuing permits under the CWA. See *id.* at 293-294, 297, 298-299. In holding that EPA could not

impose such a condition, the Fifth Circuit stated that "[t]he language of [33 U.S.C. 1342(b)] is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements." *Id.* at 297. With respect to Section 7(a)(2) of the ESA, the court stated:

> EPA argues that ESA § 7(a)(2) * * * compels EPA to do everything reasonably within its power to protect endangered species. The flaw in this argument is that if EPA lacks the power to add additional criteria to [33 U.S.C. 1342(b)], nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.

Id. at 298. The court concluded that "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction. The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA." *Id.* at 299.[7]

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[7] The Ninth Circuit's reliance (App. 45a-46a) on *Conservation Law Foundation of New England, Inc.* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979), and *Defenders of Wildlife* v. *Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989), is misplaced. In *Conservation Law Foundation*, the court upheld the denial of a preliminary injunction against a lease sale under the Outer Continental Shelf Lands Act (OCSLA). See 623 F.2d at 714-715, 719-720. The court observed that the ESA would apply to future exploration and production stages of the project, see *id.* at 715, but it did not address the proper resolution of any hypothetical future dispute in which Section 7(a)(2) of the ESA might be claimed to prohibit conduct that the OCSLA required. The court in *Defenders of Wildlife* held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) "does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides," 882 F.2d at 1299, and it concluded that particular EPA registrations of strychnine violated Section 9 of the ESA, see *id.* at 1300-1301. The court did not find a violation of Section 7(a)(2), however, nor did it suggest that the FIFRA *required* EPA to register the pertinent strychnine products. The court therefore had no occasion to address the

3. The court of appeals' decision raises issues of government-wide significance. Section 7(a)(2) applies to every "Federal agency," 16 U.S.C. 1536(a)(2), and the ESA defines that term to mean "any department, agency, or instrumentality of the United States." 16 U.S.C. 1532(7). As the court of appeals judges who dissented from denial of rehearing en banc observed, "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." App. 78a n.4. The substantial practical implications of the court of appeals' decision reinforce the need for review by this Court.

4. The court of appeals also held that "EPA's approval of Arizona's transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." App. 23a. The court stated that a principal basis for FWS's finding that the transfer of permitting authority would not jeopardize listed species—*i.e.*, FWS's conclusion that the transfer decision was not the legal cause of any harm to the species because the transfer was mandated by Section 402(b) of the CWA—was inconsistent with EPA's antecedent determination that consultation was required

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interpretive issue presented in this case. In a subsequent decision involving the ESA, moreover, the Eighth Circuit observed that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority." *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 630 (2005) (citing, *inter alia*, *Platte River*).

Both *Conservation Law Foundation* and *Defenders of Wildlife* are thus fully consistent with the holding in *American Forest* that Section 7(a)(2) requires federal agencies "to channel their *existing* authority in a particular direction" but does not supersede contrary statutory commands. 137 F.3d at 299. But even if the court of appeals' understanding of *Conservation Law Foundation* and *Defenders of Wildlife* were correct, the conflict with the decisions in *Platte River* and *American Forest* would still warrant this Court's review.

by Section 7(a)(2) of the ESA. See App. 25a-26a. The court stated that, "[b]y relying on [the FWS BiOp's] line of reasoning after determining that it did have a consultation obligation, the EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult." App. 25a. The court explained that such a position would be contrary to the text of Section 7(a)(2) of the ESA, which "makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species." App. 26a.

The court of appeals was correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand, but cf. *American Forest*, 137 F.3d at 298 n.6 (suggesting possible distinction between consulting obligations and substantive powers), and that Section 7(a)(2) does not require federal agencies to consult about conduct to which the no-jeopardy mandate does not apply. The court was also correct that the course of agency proceedings in this case reflected a degree of confusion regarding the ESA's application to the NPDES transfer decision. EPA's prior uncertainty, however, does not cast doubt on the lawfulness of its ultimate decision to grant Arizona's transfer application, and the relevant federal agencies have since clarified their understanding of the legal principles that govern in this setting.

a. Section 7(a)(2) of the ESA states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any [agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That phrasing makes clear that "consultation" with FWS or NMFS is not an end in itself, but a means of ensuring compliance with Section 7(a)(2)'s substantive no-jeopardy mandate. Once it is confirmed that an agency is compelled by another federal law to engage in

particular conduct, without regard to the effect of that conduct on endangered or threatened species, Section 7(a)(2) of the ESA does not require the agency to engage in consultation concerning species-related impacts that it has no authority to prevent. Cf. *Public Citizen*, 541 U.S. at 767-769 (holding that, under the "rule of reason" implicit in NEPA, a federal agency is not required to prepare an EIS assessing the environmental impacts of an action that it is legally obligated to perform).

b. In and of itself, EPA's decision to initiate consultation with FWS concerning Arizona's transfer application was not inconsistent with FWS's ultimate determination that any harm to listed species that the transfer might entail was legally attributable to Congress rather than to EPA. Neither the ESA nor the CWA *prohibits* a federal agency from seeking the views of FWS or NMFS concerning the effects on listed species of conduct that the CWA requires, even though consultation in those circumstances would not serve its usual purpose of facilitating compliance with Section 7(a)(2)'s no-jeopardy requirement. And when an agency is uncertain whether the ESA's no-jeopardy mandate applies to particular conduct, consultation with FWS or NMFS is an appropriate means of resolving that question. See App. 73a (Kozinski, J., dissenting from denial of rehearing en banc).[8]

At both the beginning and the end of its consideration of Arizona's transfer application, however, EPA expressed the view that consultation concerning that application was required by the ESA. Thus, in soliciting comments on the transfer application, EPA described the no-jeopardy mandate of Section 7(a)(2) of the ESA and stated that "[t]he approval of the State permitting program under section 402 of the Clean Water Act is a federal action subject to this requirement." 67 Fed. Reg. at 49,919. And

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[8] In some cases, moreover, it may require significant analysis to determine whether a potential effect flows from a mandatory action or a related discretionary judgment.

in the *Federal Register* notice that announced EPA's approval of the State's application, the agency stated that "[i]ssuance of the biological opinion * * * concludes the consultation process required by ESA section 7(a)(2)." 67 Fed. Reg. at 79,630.[9]

The FWS BiOp did not discuss 50 C.F.R. 402.03, and it did not address the question whether the consultation that produced the BiOp was required by the ESA. The BiOp's no-jeopardy finding, however, was grounded in substantial part on FWS's conclusion that, even if Arizona's administration of the NPDES program proved to be less protective of listed species than the prior EPA regime, that disparity would not be "caused" by EPA's approval of the transfer, but instead would be attributable to "Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." C.A. App. 224. Because Section 7(a)(2)'s consultation requirement is intended to facilitate compliance with the no-jeopardy mandate and therefore applies only to conduct that is properly attributable to the agency itself, FWS's causation analysis logically implies that consultation regarding Arizona's transfer application was not compelled by the ESA. EPA's failure at that time to recognize the full implications of FWS's causation analysis, however, does not cast doubt on the legality of the challenged transfer decision. FWS's analysis reflects a correct understanding of the causation principles that govern in this area, and it provides a fully sufficient basis for concluding that approval of

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[9] EPA had made similar statements in considering some prior state applications for transfer of NPDES permitting authority. See 64 Fed. Reg. 73,552, 73,554-73,555 (1999) (requesting comment on Maine application); 66 Fed. Reg. 12,791, 12,793-12,794 (2001) (approving the same); 63 Fed. Reg. 33,657-33,658 (1998) (requesting comment and approving public hearing on Texas application); 61 Fed. Reg. 65,047, 65,053 (1996) (approving Oklahoma application); *id.* at 47,932, 47,934-47,935 (requesting comment on Louisiana application). See also App. 7a-8a n.3.

Arizona's transfer application would not jeopardize any listed species. See pp. 11-13, *supra*.[10]

c. The relevant federal agencies recently clarified their positions concerning the applicability of Section 7(a)(2) of the ESA to EPA's NPDES transfer decisions under the CWA after the State of Alaska submitted an application for transfer of NPDES permitting authority. In connection with that application, EPA requested confirmation of its current view that, because Section 402(b) of the CWA requires that the State's application be granted if the CWA criteria are satisfied, the decision whether to approve the transfer is not subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. See App. 93a-102a. FWS and NMFS have confirmed that they share that understanding of the relevant statutory provisions. See App. 103-116a. FWS and NMFS have further confirmed that, because the CWA requires that transfer applications must be granted under specified circumstances, EPA lacks "discretionary Federal involvement or control," within the meaning of 50 C.F.R. 402.03, over the transfer decision once the

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[10] Moreover, despite the government's reluctance to urge the court of appeals to rest its decision on the view that Section 7(a)(2) is altogether inapplicable to the mandatory transfer decision (and despite the Ninth Circuit's failure to accede to the government's request for further briefing on the subject if the Ninth Circuit reached the issue), there is no obstacle to this Court's review. Both the State of Arizona and private intervenors squarely raised the issue, and the Ninth Circuit squarely resolved it, so the issue was both pressed and passed on below. Of course, the Ninth Circuit need not have reached this issue at all and could have rested its decision on the inconsistency it found in the government's analysis of the consultation and jeopardy issues. This Court should at a minimum vacate the Ninth Circuit's judgment insofar as it goes beyond ordering a remand to the agency to resolve the inconsistency the panel discussed in Part III.B of its opinion, App. 23a-28a. But because the government has now resolved any such inconsistency and made clear that Section 7(a)(2) does not apply to the mandatory action at issue in this case for either consultation or no-jeopardy purposes (see pp. 25-26, *infra*; App. 93a-116a), the better course is for the Court to resolve that question.

CWA criteria are met, and EPA's approval is not the legal "cause," within the meaning of 50 C.F.R. 402.02, of any impacts on listed species that may result from a state-issued NPDES permit. See App. 105a-106a, 109a-110a, 114a-115a.

This Court has recognized that the Secretaries of the Interior and of Commerce are charged with primary responsibility for administering the ESA, and that their construction of ambiguous ESA provisions is entitled to judicial deference. See *Sweet Home*, 515 U.S. at 703-704; p. 18, *supra*. The recent FWS and NMFS communications regarding Alaska's pending transfer application reflect those agencies' considered interpretations of 16 U.S.C. 1536(a)(2), and of 50 C.F.R. 402.02 and 402.03, published regulations promulgated jointly by the two agencies in 1986 after notice-and-comment rulemaking. Because the responsible agencies have clearly stated their position that neither the consultation requirement nor the no-jeopardy mandate of Section 7(a)(2) of the ESA applies to EPA's consideration of state NPDES transfer applications, and because EPA's prior mistaken view that it was required to consult about Arizona's application does not cast doubt on the legality of the transfer decision challenged in this case, EPA's earlier misunderstanding on that point poses no obstacle to this Court's review of the Ninth Circuit's erroneous ruling. In light of the acknowledged circuit conflict and the broad significance of that ruling, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-71439, 03-72894

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT, NATIONAL ASSOCIATION OF HOME BUILDERS; STATE OF ARIZONA; ARIZONA CHAMBER OF COMMERCE, INTERVENERS DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY, PLAINTIFFS-PETITIONERS

v.

ROBERT B. FLOWERS, CHIEF OF ENGINEERS AND COMMANDER, U.S. ARMY CORPS OF ENGINEERS, DEFENDANT-RESPONDENT, CHRISTINE TODD WHITMAN, ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT-RESPONDENT GALE NORTON; STEVEN WILLIAMS, DEFENDANTS-RESPONDENTS, CONTINENTAL RESERVE II, LLC, DEFENDANT-INTERVENOR/INTERVENOR, HB LAND DEVELOPMENT COMPANY; STEPHEN A. OWENS, STATE OF ARIZONA, EX-REL, DIRECTOR ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY; GROSVENOR HOLDINGS; NATIONAL ASSOCIATION OF HOME BUILDERS; HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA; SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION; SAGUARO

RANCH INVESTMENTS LLC; SAGUARO RANCH DEVELOPMENT CORPORATION, DEFENDANT-INTERVENORS/INTERVENORS

Argued and Submitted: Nov. 1, 2004
Filed: Aug. 22, 2005

On Petition for Review of an Order of the Environmental Protection Agency. EPA No. 67-Reg. 79629, No. CV-02-01195-CKJ.

Before: REINHARDT, THOMPSON, and BERZON, Circuit Judges.

BERZON, Circuit Judge:

Under federal law, a state may take over the Clean Water Act pollution permitting program in its state from the federal Environmental Protection Agency (EPA) if it applies to do so and meets the applicable standards. This case concerns Arizona's application to run the Clean Water Act pollution permitting program in Arizona. When deciding whether to transfer permitting authority, the Fish and Wildlife Service (FWS) issued, and the EPA relied on, a Biological Opinion premised on the proposition that the EPA lacked the authority to take into account the impact of that decision on endangered species and their habitat.

The plaintiffs in this case challenge the EPA's transfer decision, particularly its reliance on the Biological Opinion's proposition regarding the EPA's limited authority. This case thus largely boils down to consideration of one fundamental issue: Does the Endangered Species Act authorize—indeed, require—the EPA to

consider the impact on endangered and threatened species and their habitat when it decides whether to transfer water pollution permitting authority to state governments? For the reasons explained below, we hold that the EPA did have the authority to consider jeopardy to listed species in making the transfer decision, and erred in determining otherwise. For that reason among others, the EPA's decision was arbitrary and capricious. Accordingly, we grant the petition and remand to the EPA.

I. Background

A. The National Pollution Discharge Elimination System (NPDES)

The Clean Water Act ("the Act"), passed in 1972, established the National Pollution Discharge Elimination ("pollution permitting") System. That System gave the EPA authority to issue permits for the discharge of pollutants into navigable waters. *See* 33 U.S.C. § 1342(a). The Act further provides that a state may apply to the EPA to administer the federal pollution permitting program regarding waters within its borders. § 1342(b). The EPA Administrator must determine whether the state has met nine specified criteria and "shall approve" state applications that meet those criteria. *Id.*

The state transfer provisions of § 1342(b) have proven popular. Arizona was the forty-fifth state to obtain pollution permitting authority from the EPA. *See* 67 Fed. Reg. 79,629 (Dec. 30, 2002) (announcing approval of Arizona's pollution permitting authority); 65 Fed. Reg. 50,528, 50,529 (Aug. 18, 2000) (listing then-approved states).

Once the EPA transfers a permitting program to a state government, the EPA Administrator maintains an oversight role to assure that the state follows Clean Water Act standards. 33 U.S.C. § 1342(c)(2). If the Administrator determines that the state is not following those standards, the Administrator must demand corrective action. If the state does not take such action, the Administrator must withdraw approval of the state program. § 1342(c)(3).

B. The Endangered Species Act

In 1973, one year after the enactment of the Clean Water Act, Congress passed the Endangered Species Act, "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978). The present case focuses on section 7 of the Endangered Species Act, 16 U.S.C. § 1536.

Section 7(a)(2) imposes substantive and procedural requirements on "each Federal agency" with regard to "any action authorized, funded, or carried out by such agency." 16 U.S.C. § 1536(a)(2). Each agency must "insure" that such actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *Id.* Agencies must use the "best scientific and commercial data available" to make such decisions, and must do so "in consultation with and with the assistance of the Secretary [of the Interior]." *Id.*

Endangered Species Act regulations[1] describe the consultation and action requirements imposed on agencies. Section 7's requirements apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. An agency must determine if a proposed action "may affect" either endangered or threatened species (denominated "listed species," § 402.02) or those species' critical habitat, and, if so, must seek formal consultation with the FWS, or, for marine species, the National Marine Fisheries Service. § 402.14(a). During such consultations, the FWS issues a Biological Opinion analyzing whether the action is likely to jeopardize any listed species or its habitat. § 402.14(h). The federal agency then makes a final decision regarding whether and how to pursue the proposed action. § 402.15(a).

A Biological Opinion must include a "summary of the information on which the opinion is based," a "detailed discussion of the effects of the action on listed species or critical habitat," and "[t]he Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." § 402.14(h).

The "effects of the action" include "direct and indirect effects . . . together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline[, which] includes the past and present impacts of all Federal, State, or private actions and other human activities

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[1] The relevant Endangered Species Act regulations were jointly issued by the FWS, Department of the Interior, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, and Department of Commerce. *See* 50 C.F.R. ch. 4.

in the action area." § 402.02. "Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.*

By its terms, section 7(a)(2) applies only to "federal agenc[ies]," not to state governmental bodies. Accordingly, the EPA's pollution permitting decisions are subject to section 7(a)(2), but state pollution permitting decisions are not.

Noting that the "EPA now consults with the [FWS and National Marine Fisheries Service] under section 7 of the [Endangered Species Act] on . . . approval of State National Pollutant Discharge Elimination (NPDES) permitting programs" but recognizing that after transfer, section 7 will not apply to the state's permitting decisions, the EPA signed a Memorandum of Agreement with the FWS governing the two agencies' involvement with transferred pollution permitting programs. *See* 66 Fed. Reg. 11,202, 11,202, 11,207 (Feb. 22, 2001). Asserting that the "EPA's oversight includes consideration of the impact of permitted discharges on waters and species that depend on those waters," *id.* at 11,215, the Memorandum lists several procedures that the EPA and FWS will establish to ensure that they communicate federal endangered species concerns to state water pollution permitting agencies.[2] *Id.* at 11,216. The Memorandum is not, however, binding on states. *Id.* at 11,206 ("[T]he MOA . . . does not impose any requirements on States."). Rather, the EPA will "*encourage* the State . . . to facilitate the involvement of permittees" in the described processes. *Id.* at 11,216 (emphasis added).

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[2] We discuss these procedures in more detail in Part III(D)(2)(a), *infra*.

C. The EPA's approval of Arizona's pollution permitting transfer application

The State of Arizona (Arizona) applied on January 14, 2002 for transfer of pollution permitting authority regarding Arizona waterways (except those on Indian land). 67 Fed. Reg. 49,916, 49,917 (Aug. 1, 2002). Under that proposal, the Arizona Department of Environmental Quality (ADEQ) was to be responsible for issuing water pollution permits. The EPA's regional office in San Francisco determined that the transfer could affect listed species in Arizona and so initiated formal section 7 consultation with FWS. Announcing this decision, the EPA stated that "[s]ection 7(a)(2) of the [Endangered Species Act] places a statutory requirement (separate and distinct from [33 U.S.C. § 1342(b)]) for EPA to 'insure that any action authorized, funded or carried out[by EPA]'" is unlikely to jeopardize listed species or adversely modify their critical habitat, and that the EPA is therefore "required" to consult regarding the transfer decision. 67 Fed. Reg. at 49,917 (final alteration in original); *see also id.* at 49,919.[3]

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[3] The EPA has followed the section 7 consultation process before transferring permitting authority to states for more than a decade. Every pollution permitting transfer decision since 1993 has involved some form of EPA consultation with FWS regarding endangered species. *See* 66 Fed. Reg. 12,791 (Feb. 28, 2001) (Maine); 63 Fed. Reg. 51,164 (Sept. 24, 1998) (Texas); 61 Fed. Reg. 65,047 (Dec. 10, 1996) (Oklahoma); 61 Fed. Reg. 47,932 (Sept. 11, 1996) (Louisiana); 60 Fed. Reg. 25,718 (May 12, 1995) (Florida); 59 Fed. Reg. 1535, 1543 (Jan. 11, 1994) (announcing 1993 approval of South Dakota's application after FWS consultation). Earlier pollution permitting transfer decisions do not appear to have been preceded by Endangered Species Act consultation. *See, e.g.*, 52 Fed. Reg. 27,578 (July 22, 1987) (Utah); 51 Fed. Reg. 44,518 (Dec. 10, 1986) (Arkansas); 49 Fed. Reg. 39,063 (Oct. 3, 1984) (Rhode Island); 47 Fed. Reg. 17,331 (Apr. 22, 1982) (New Jersey); 44

During the course of the consultation, FWS field office staff in Arizona expressed serious reservations about the proposed transfer. FWS staff noted that section 7 consultations regarding past pollution permits in Arizona had led to mitigating measures to protect species' critical habitat, and feared that, without such mandatory consultation, Arizona would issue permits without mitigating measures. As a result, there could be harm to certain listed species and habitat, particularly the southwestern willow flycatcher, Pima pineapple cactus, Huachuca water umbel, cactus ferruginous pygmy owl,[4] "and perhaps other species." The staff concluded "that the transfer of this program from EPA to the State causes the loss of protections to species resulting from the section 7 process, and the impact of this loss must be taken into account in the effects analysis in the biological opinion." In response, EPA staff opined that the EPA lacked the legal authority to base its transfer decision on these concerns, because the agency does "not have the legal authority to regulate the non-water-quality-related impacts associated with State NPDES-

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Fed. Reg. 61,452 (Oct. 25, 1979) (Alabama); 39 Fed. Reg. 26,061 (July 16, 1974) (announcing approval of applications from fifteen states in the early years of Clean Water Act operation).

[4] We note that FWS has proposed removing the pygmy owl from the list of threatened and endangered species, although the owl currently remains listed. *See* 70 Fed. Reg. 44,547 (Aug. 3, 2005). Even if the FWS eventually de-lists the pygmy owl, that would not affect our analysis of this case for two reasons. First, we focus on the agency's action based on the record before it, which includes the pygmy owl's listed status. Second, the EPA's action can affect multiple listed species in Arizona, not only the pygmy owl. While we illustrate our analysis with examples of individual listed species, including the pygmy owl, our analysis applies with equal force even if the FWS de-lists any such species.

permitted projects that are of concern to FWS, including the authority to object to such permits based on non-water quality related impacts to listed species."

To resolve this disagreement, staff of the two agencies developed an "Interagency Elevation Document," summarizing their respective opinions. Pursuant to the Memorandum of Agreement, this document transferred authority over the Biological Opinion to the Director of FWS, the Director of the National Marine Fisheries Service, and the Deputy Assistant Administrator of Water at the EPA. *See* 66 Fed. Reg. 11,202, 11,209 (Feb. 22, 2001).

After the consultation at the national level between the EPA and FWS, the Field Supervisor of the Arizona Ecological Services Field Office of the FWS issued a Biological Opinion recommending approval of the transfer of permitting authority to Arizona. Noting the loss of section 7 consultation, the Biological Opinion recognized that, after the transfer, no federal agency would have the legal authority to consult with developers concerning the potential impact on listed species of any pollution permits. Such consultation had lead to measures protecting listed species, including the Pima pineapple cactus, razorback sucker, Gila topminnow, southwestern willow flycatcher, and cactus ferruginous pygmy owl. Although Arizona could voluntarily consult with FWS regarding pollution permits, neither the EPA nor FWS could *require* Arizona to act on behalf of listed species.

After recognizing this impact of the transfer of permitting authority, the Biological Opinion concluded that

> the loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process

that exists with respect to Federal [Clean Water Act] permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

The Biological Opinion goes on to conclude:

While reviewing this above referenced approval, the FWS has spent considerable time analyzing direct and indirect effects. In the course of this analysis, our field office staff biologists have expressed concerns that the approval will result in loss of section 7 consultation-related conservation benefits. We have stated our belief that the loss of section 7 conservation benefits is an indirect effect of the authorization. Furthermore, we have stated that this loss of conservation benefits will appreciably reduce the conservation status of the cactus ferruginous pygmyowl and the Pima pineapple cactus. Notwithstanding this, our final opinion is that the loss of section 7-related conservation benefits, which would otherwise be provided by section 7 consultations, is not an indirect effect of the authorization action.

In changing from a Federal permitting program to a State permitting program, the permit-related section 7 processes for consultation will no longer apply. Essentially, there will be no substantive change in the permit program, but there will be a reduction in the number of mechanisms available to both of our agencies to protect federally-listed species and critical habitat in Arizona. We believe that the assumption of the program by the State of Arizona will not cause development, and concur that

> EPA's [Clean Water Act]-mandated approval of the program has only an attenuated causal link to the reduction in Federal [Endangered Species Act] conservation responsibilities.[5]

As an alternative to this lack-of-causation analysis, the Biological Opinion stated that other federal and state laws would sufficiently protect endangered species, so that transfer of permitting authority would not likely jeopardize such species or their critical habitat. These other laws included section 9 of the Endangered Species Act, 16 U.S.C. § 1538, which outlaws "taking" an endangered species. The Biological Opinion's reliance on this statute contrasted with earlier FWS staff concerns that "section 9 does not generally apply to plant species (such as the Pima pineapple cactus) and it is not effective for extremely rare, but wide-ranging species (such as the cactus ferruginous pygmy-owl). FWS therefore does not believe that section 9 enforcement offsets the effects of approving this program."

Independently of the Biological Opinion, an official at the Arizona Game and Fish Department[6] indicated that his department had "worked cooperatively with ADEQ" when reviewing past water pollution permit applications

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[5] The just-quoted passage mentioned two species in passing in the midst of concluding that any harm to those species was not an indirect effect of the EPA's transfer decision. Elsewhere, the Biological Opinion noted the listed species in Arizona but did not specifically discuss the effect of the transfer on any of these species.

[6] The official, Bob Broscheid, whose title at the Arizona Game and Fish Department is "Project Evaluation Program Supervisor," wrote to an official at the EPA's regional office that would supervise Arizona's permitting decisions. He also carbon copied an ADEQ official. Broscheid's letter describes the Game and Fish Department's understanding of its role but does not purport to speak for ADEQ.

and "look[ed] forward to continuing this level of cooperation between our agencies." Noting the EPA-FWS Memorandum of Agreement, the official asserted that "[t]his agreement will serve as a guideline for EPA, FWS, and the State of Arizona to ensure that NPDES permits will not negatively impact endangered and threatened species." The EPA's response to the Game and Fish Department official's statement was: "EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application."

FWS staff had earlier suggested the development of a formal memorandum of understanding with ADEQ or the Arizona State Lands Department, but did not mention the Game and Fish Department. No such memorandum of understanding was ever signed, and no official from either ADEQ or the State Lands Department submitted a letter similar to the Game and Fish Department letter.

The EPA approved the permitting authority transfer two days after the FWS issued the Biological Opinion, *see* 67 Fed. Reg. 79,629 (Dec. 30, 2002), noting its belief that the Biological Opinion "appropriately considered all relevant information regarding the effects of the approval." The Arizona Department of Environmental Quality (ADEQ) currently operates the program, issuing permits for water pollution. *See ADEQ: Permits, at* http://www.azdeq.gov/environ/water/permits/index.html (last visited July 5, 2005).

Petitioners, Defenders of Wildlife, the Center for Biological Diversity, and Craig Miller, a resident of Pima County, Arizona (collectively, Defenders) challenge the pollution permitting transfer in two lawsuits,

consolidated before us. In the first, Defenders filed a petition for review of the EPA's transfer decision with this court. The petition alleges that the EPA failed adequately to consider the transfer's impact on endangered and threatened species and their habitat, and, in particular, that the EPA's reliance on the Biological Opinion violated the Endangered Species Act and was arbitrary and capricious under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). Three other sets of parties have since intervened, supporting the transfer but taking some issue with the EPA's administrative practices and reasoning: the National Association of Home Builders and several Arizona home builders' associations (Home Builders); the Arizona Chamber of Commerce and several other business associations (Chamber); and Arizona.

Defenders also filed an Endangered Species Act and Administrative Procedure Act suit in district court in Arizona alleging, among other claims, that the Biological Opinion supporting the pollution permitting transfer does not comply with Endangered Species Act standards. The district court held that this court has exclusive jurisdiction over the Biological Opinion challenge pursuant to 33 U.S.C. § 1369(b)(1)(D), and ordered that challenge severed from other claims in the district court, transferred to this court, and consolidated with Defenders' suit challenging the EPA transfer.

II. Jurisdiction & Standing

Before proceeding to the merits, we must satisfy ourselves that we have subject-matter jurisdiction over this case and that petitioners have standing to raise their claims. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). The Chamber contends this

court lacks jurisdiction to hear Defenders' challenge to the Biological Opinion, and the Home Builders maintain that Defenders do not have standing to bring this action. Neither argument is convincing.

A. Subject-Matter Jurisdiction

"[A]ny interested person" may seek judicial *review of* the EPA Administrator's pollution permitting or state transfer decisions in the circuit court in which the person resides, so long as that circuit is directly affected by the Administrator's action. 33 U.S.C. § 1369(b)(1). Section 1369(b)(1)(D) grants this court subject matter jurisdiction to review "any determination as to a State permit program submitted under section 1342(b)." The Chamber argues that §1369(b) authorizes review only of the EPA Administrator's transfer decision, not of a Biological Opinion completed by the FWS that informs that decision.

We disagree. The Supreme Court has noted that biological opinions typically have a "virtually determinative effect" on the ultimate agency action. *Bennett v. Spear*, 520 U.S. 154, 170, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *see also id.* at 169, 117 S. Ct. 1154 (noting that a Biological Opinion "in reality . . . has a powerful coercive effect on the action agency" with the potential to "alter[ ] the legal regime to which the action agency is subject"). It would be anomalous to review the ultimate agency "determination" while ignoring the reasoning contained in a biological opinion "virtually determinative" of that action.

The actual sequence of events in this instance in consistent with the Supreme Court's observations in *Bennett* regarding the impact of a biological opinion on an agency's final decision. The EPA Administrator's

decisionmaking process before approving Arizona's permitting transfer application included section 7 consultation with FWS and the consideration of the Biological Opinion that resulted from it: The initial dispute between the EPA and FWS regarding the Biological Opinion was "elevated" to the national level, and the final Biological Opinion incorporated the results of consultation between the EPA and FWS. The final EPA decision, in turn, followed the issuance of the Biological Opinion by two days. In its unpublished Response to Comments regarding Arizona's application to assume permitting authority, released the same day as its final decision, the EPA noted that it had "considered the [biological] opinion of the FWS in proceeding with its approval action." The EPA went on to approve the Biological Opinion's conclusions, stating its determination that "FWS appropriately considered all relevant information regarding the effects of the approval action on listed species and designated and proposed critical habitat in arriving at its conclusion, including a broad range of direct and indirect effects of EPA's approval action," and declaring that "no information has been submitted which would indicate that the conclusions in FWS's biological opinion are incorrect."

The EPA, as part of the statutorily mandated consultation process, approved of and relied upon the Biological Opinion when considering Arizona's transfer application. Evaluating the Opinion's evidentiary and analytic basis is thus integral to reviewing the EPA's final decision.[7]

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[7] The EPA does not argue otherwise. Indeed, the EPA's argument in this court largely replicates the Biological Opinion's reasoning, confirming that the reasoning was a key factor in its decision.

We conclude that we have jurisdiction to consider the adequacy of both the section 7 consultation and the Biological Opinion that resulted from it while reviewing the EPA's final decision.

B. Standing

Petitioners who "allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief" establish Article III standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). As Defenders' members meet this three-part test, Defenders has organizational standing to represent their interests.

Several Defenders' members reside in Arizona and photograph and observe in Arizona various named, listed species—such as the cactus ferruginous pygmy owl, Huachuca water umbel, and the other species noted in Part I.C, *supra*—and hike and camp in these species' various habitats. These members do so regularly and plan to continue doing so in the future, because, among other reasons, these activities bring them recreational, aesthetic, and spiritual fulfillment. The members' activities occur on and near land—such as the upper San Pedro River region, the Sonoran Desert near Saguaro National Park and Tortolita Mountains Park, and the Verde River region—where significant commercial and residential development is taking place, development that depends on water pollution permits. The members assert, consistently with the Biological Opinion, that section 7 consultation has in the past led to mitigation measures by real estate developers in these areas and has thereby protected listed species and their habitat. They further assert that the loss of section 7 consultation would mean that developers of future projects

would not engage in such mitigation measures and that listed species, and the members' interest in their activities involving them, would thereby be harmed.

The members thus "observe[ ] or work[ ] with . . . particular animal[s and plants] threatened by a federal decision," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); allege a harm to those animals and their habitat throughout Arizona; and assert "that [they have] an aesthetic or recreational interest in a particular place, or animal, or plant species . . . impaired by a defendant's conduct." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182-83, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109-10 (9th Cir. 2002) (holding that regular "recreation and nature appreciation" on land covered by challenged agency action established injury-in-fact). Those allegations meet the criteria for demonstrating an adequate injury in an environmental case.

The Home Builders argue that alleging harm throughout the state of Arizona cannot establish standing, because the state encompasses too large an area to permit a sufficiently specific injury-in-fact allegation. The Defenders' members who filed declarations, however, mention specific subareas within the state where they engage in activities related to particular listed species and where development is occurring. Our cases require no greater precision. *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1303 (9th Cir. 1993); *see also Kootenai Tribe*, 313 F.3d at 1110 (finding standing where party alleged harm to 58.5 million acres of land). Moreover, in

light of the statewide impact of the EPA's transfer decision, alleging an injury-in-fact covering large areas within the state simply reflects the relatively broad nature of the potential harm.

The alleged injuries are fairly traceable to the EPA's pollution permitting transfer decision. As alleged by Defenders, that decision will remove water pollution permitting decisions from the significant protections provided by section 7.

Finally, the alleged injuries would be redressable by a court order vacating or mitigating the EPA's transfer decision. The protections accorded by the Endangered Species Act would then come back into operation.

Additionally, section 7(a)(2) of the Endangered Species Act contains *both* substantive and procedural requirements, and the plaintiffs in this case have alleged violations of *both* requirements. They thus have alleged, in addition to substantive noncompliance, "procedural" harms, as described in *Lujan* and subsequent cases—here, lack of adequate consultation between the EPA and the FWS, including reliance on a legally improper Biological Opinion.

Reliance on procedural harms alters a plaintiff's burden on the last two prongs of the Article III standing test. See *Lujan*, 504 U.S. at 572 n.7, 112 S. Ct. 2130. To establish standing by alleging procedural harm, the members must show only that they have a procedural right that, if exercised, *could* protect their concrete interests and that those interests fall within the zone of interests protected by the statute at issue. *See Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004); *Tyler v. Cuomo*, 236 F.3d

1124, 1136 (9th Cir. 2000); *Churchill County v. Babbitt*, 150 F.3d 1072, 1077 (9th Cir. 1998), *amended by* 158 F.3d 491 (9th Cir. 1998).

The members have met these procedural harm requirements. They have, first, established a reasonable probability that the challenged action will threaten their concrete interests. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003); *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 n.6 (9th Cir. 1995). We held in Citizens for Better Forestry that violating the procedural requirements for forestry decisions meets that bar, as the violation lessens the likelihood that environmental considerations will be attended to in making those decisions. *Id.* at 972-75. Similarly, the use of improper section 7 consultation by reason of an inadequate biological opinion lessens the likelihood that the impact of the proposed action on listed species and their habitats will be recognized and accounted for in making the transfer decision. *See id.* at 972.

An association has standing to sue on behalf of its members who have individual standing if "the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181, 120 S. Ct. 693. The interests at stake—protection of endangered species—plainly relate to Defenders' mission. Nor does this lawsuit require the active involvement of individual members, as the relief sought will run equally to all of them.

Accordingly, we hold that Defenders has standing to challenge the EPA's pollution permitting transfer decision. *See Defenders of Wildlife v. Flowers*, 414 F.3d

1066 (9th Cir. 2005) (holding that Defenders has standing to challenge particular construction permits in Arizona because of "their members' interest" in species that might live where construction would occur).

III. The Merits

A. Standard of Review

Under the Endangered Species Act, each agency has an obligation to "insure" that any action it takes is "not likely to jeopardize" listed species or their critical habitats. *See* § 1536(a)(2);[8] 50 C.F.R. § 402.15(a) (requiring each agency to determine how to proceed "in light of its section 7 obligations and the Service's biological opinion"). Defenders allege that the EPA failed to satisfy

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[8] The relevant portions of section 7(a) of the Endangered Species Act provide:

> (1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.
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> (2) Each Federal agency *shall*, in consultation with and with the assistance of the Secretary, *insure that any action authorized, funded or carried out* by such agency (hereinafter in this section referred to as an "agency action") *is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical*, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. §§ 1536(a)(1)-(2) (emphasis added).

this obligation and thus acted arbitrarily and capriciously, in violation of the Administrative Procedure Act.[9] *See* 5 U.S.C. § 706(2)(A); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (applying § 706(2)(A) arbitrary and capricious review to § 1369(b) petition).

An agency decision will survive arbitrary and capricious review if it is

> rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (citations omitted). Agency decisions may not, of course, be inconsistent with the governing statute. 5 U.S.C. § 706(2)(A) (instructing courts to "set aside" agency action "not in accordance with law"). Also, internally contradictory agency reasoning renders resulting action "arbitrary and capricious;" such actions are not "'founded on a reasoned evaluation of the relevant factors.'" *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quot-

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[9] All parties agree that arbitrary and capricious review applies to Defenders' petition for review.

ing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)); *see also Gen.Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding agency action "arbitrary and capricious" because it was "internally inconsistent and inadequately explained").

Defenders allege, in particular, that the EPA's reliance on the Biological Opinion was arbitrary and capricious, as the Biological Opinion is itself invalid. *See Res. Ltd.*, 35 F.3d at 1304 (holding that an action agency may not arbitrarily and capriciously rely on a flawed biological opinion); *Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (same). An agency can satisfy the arbitrary and capricious standard of review, however, even if it relies on an "admittedly weak" Biological Opinion, if there is no "information the Service did not take into account which challenges the [biological] opinion's conclusions." *Id.* at 1415 (*cited in Res. Ltd.*, 35 F.3d at 1304). The upshot is that we must consider whether the EPA, through the Biological Opinion or otherwise, considered all the relevant Endangered Species Act factors and offered an explanation for its decision that is both "plausible" and internally coherent.

Applying this test, we first examine the consistency of the EPA's reasoning. Next, we examine the Biological Opinion, including its legal conclusion regarding the effects of the transfer decision on listed species and their habitat. We then review the other information relied on by the EPA.

B. Coherent reasoning?

As an initial matter, the EPA's approval of Arizona's transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations. Its reasoning was therefore "internally inconsistent and inadequately explained." *Gen.Chem. Corp.*, 817 F.2d at 857.

The EPA definitively stated several times during the decisionmaking process, including when announcing its final decision, that section 7 requires consultation regarding the effect of a permitting transfer on listed species. The agency so stated when announcing its *Memorandum of Agreement with the FWS*, *see* 66 Fed. Reg. 11,202, 11,206 (Feb. 22, 2001); when announcing that it had initiated section 7 consultation regarding Arizona's application because, pursuant to 50 C.F.R. § 402.14(a), approving that application "may affect" listed species, see 67 Fed. Reg. 49,916, 49,917, 49,919 (Aug. 1, 2002); when responding, in an unpublished document, to comments regarding Arizona's application (noting that "[t]here is no doubt" that the pollution permitting transfer "is an action mandating formal consultation under section 7"); and when announcing the approval of Arizona's application. *See* 67 Fed. Reg. 79,629, 79,630 (Dec. 20, 2002) (noting that section 7(a)(2) generally "requires" consultation and that the EPA consulted with FWS "under section 7(a)(2)").

Also, before deciding that consultation was necessary, the EPA first determined that transferring pollution permitting authority to Arizona "may affect" listed species and their critical habitat. *See* 50 C.F.R. § 402.14(a) (requiring consultation when an agency de-

termines its action "may affect" listed species or critical habitat). The EPA, in its unpublished biological evaluation, made this determination in recognition that in the absence of section 7 consultation on each permitting decision, "there will be a reduction in the number of mechanisms available to the [FWS] to protect Federally-listed species and designated critical habitat in Arizona."

Despite the lucidity and consistency of its position on the consultation point in the administrative proceedings, in litigation the EPA's lawyers have taken varying stances on the same issue. Before the Fifth Circuit, the EPA "suggest[ed]" that section 7 compelled consultation regarding pollution permitting transfers and, when necessary to protect species, allowed conditioning such transfers on formal agreements requiring states to follow section 7 procedures when issuing permits. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). The Fifth Circuit rejected the latter position and did not address the former. *Id.* at 298 & n.6.

The EPA's brief in this case states that *American Forest* "supports a finding that EPA lacks" authority to protect endangered species when considering pollution permitting approvals. The same brief, however, maintains that we need not decide the question because the agency did not rely on this position in its decision in this case. At oral argument, the EPA declined to take a position as to whether it has an obligation under section 7(a)(2) to consult with FWS with regard to permitting transfer decisions—even though, during the decision-making process, the agency unequivocally stated several times that it does have such an obligation.

The EPA's post-decision equivocation cannot have any impact on our consideration of the validity of the transfer decision. We must review the EPA's actions based on the "grounds . . . upon which the record discloses that its action was based." *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 87, 63 S. Ct. 454, 87 L.Ed. 626 (1943); *see also Gifford Pinchot Task Force v. U.S. FWS*, 378 F.3d 1059, 1072 n.9 (9th Cir. 2004). The record shows unequivocally that the EPA based the action under review in this case on its belief that section 7 required consultation. We must judge its reasoning taking that position into account.

Doing so, we conclude that the obligation to consult —which, under the regulations, applies only to federal agency actions that "may affect" listed species, 50 C.F.R. § 402.14(a)—and the reasons given in the Biological Opinion for concluding that the transfer decision would not have an indirect effect on endangered species cannot coexist under section 7(a)(2). The Biological Opinion reasoned that there could be no such effect, because (1) the EPA has no authority to disapprove transfer applications because of an impact on listed species, section 7(a)(2) of the Endangered Species Act notwithstanding; (2) any impact on the post-transfer protection of listed species was the result of Congress' determination that states have no consultation or mitigation obligations, not of the transfer decision; and (3) the potential future impact on listed species would be caused entirely by new private development, and the transfer decision would not cause such development. By relying on this line of reasoning after determining that it did have a consultation obligation, the EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult. One would not

expect that Congress would set up such a nonsensical regime. Not surprisingly, it did not.

Section 7(a)(2) makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species.[10] Instead, in one, integrated provision, the statute provides that agencies "shall, in consultation with and with the assistance of the [FWS], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ." An agency's obligation to consult is thus *in aid of* its obligation to shape its own actions so as not to jeopardize listed species, not independent of it. *Both* the consultation obligation and the obligation to "insure" against jeopardizing listed species are triggered by "any action authorized, funded, or carried out by such agency," and *both* apply if such an "action" is under consideration.

This being the case, the two propositions that underlie the EPA's action—that (1) it must, under the Endangered Species Act, consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a

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[10] As described above, section 7 consultation is triggered by a determination that an agency action "may affect" listed species, 50 C.F.R. § 402.14(a), and an obligation to act to mitigate harm to such species is triggered if the FWS determines that the agency action is "likely to jeopardize" listed species or "adverse[ly] modif[y]" their habitat. § 402.14(h). If an agency action *cannot* legally affect listed species—as the Biological Opinion concludes regarding the EPA's approval of Arizona's application—then the "may affect" standard is not met.

matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true. Because the agency's decisionmaking was based on contradictory views of the same words in the same statutory provision, the ultimate decision was not the result of reasoned decisionmaking.

Additionally, the third prong of the Biological Opinion's reasoning—that it is private development, not the EPA's transfer decision, that would cause any impact on listed species—suffers from an independent lack of plausibility. Events can, of course, have more than one cause. Events can be caused by several actions in a "but-for" causal chain. If any one of the necessary actions does not take place, the ultimate event does not occur. *See, e.g., Olympic Airways v. Husain*, 540 U.S. 644, 653, 124 S. Ct. 1221, 157 L. Ed. 2d 1146 (2004) ("[T]here are often multiple interrelated factual events that combine to cause any given injury."). Obviously, without private decisions to construct new developments, there will be no Clean Water Act construction permits and no impact from the issuance of such permits on listed species or their habitats. Just as obviously, without the transfer of permitting authority from the federal to the state government, developers could be required, as they were before the transfer decision, to mitigate any impact from their development on listed species. So the impact of private development will be different depending upon whether the federal or state government does the permitting. In other words, the two sets of decisions *together*—the private development decisions and the governmental transfer decision—but not either one independently, have the potential to affect listed species and their habitat. The Biological Opinion's determination to the contrary disregards the obvious

cause analysis and thus fails the reasoned decision-making standard.

For these reasons, the transfer decision cannot stand. We must remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute.

C. Statutory power to protect species?

Even viewed in isolation, the first explanation for the EPA's no impact conclusion—that the loss of section 7 consultation was not an effect of its transfer decision because the agency had no authority to base its transfer decision on the loss of consultation—fares no better.

Under the statutory regime, the statutory obligation is to "insure" against likely jeopardy of listed species. The two critical factors triggering this obligation are (1) that the "action" be one for which the agency can fairly be ascribed responsibility, namely, an action "authorized, funded or carried out" by the agency; and (2) that there is the requisite nexus to an impact on listed species, namely, a direct or indirect effect "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]." 16 U.S.C. § 1536(a)(2). There are, consequently, three relevant statutory concepts governing the reach of section 7(a)(2): the nexus to any impact on listed species, the nature of the obligation to "insure" against jeopardizing listed species, and the actions covered.

1. Nexus

The case law indicates that a negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result. Otherwise, the requisite nexus is absent.

A seminal section 7 indirect effects case, *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), held that the Department of Transportation was responsible for development encouraged by interstate highway construction, because the Department did "control this development to the extent that [it] control[s] the placement of the highway and interchanges." *Id.* at 374. Recently, the Supreme Court in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004) endorsed a similar standard to that used in National Wildlife Federation, albeit under a different statute.

Public Citizen concerned the application of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, regulations to the U.S. Department of Transportation's (DOT) regulations governing safety rules for Mexican trucks traveling on American roads. The NEPA regulations share with the Endangered Species Act regulations a similar definition of "indirect effects." *Compare* 40 C.F.R. § 1508.8(b) ("Indirect effects . . . are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.") *with* 50 C.F.R. § 402.02 ("Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.").

The question in *Public Citizen* was whether DOT was required under NEPA to develop an environmental impact statement with regard to the pollution caused by the entry of Mexican trucks onto United States highways under the North American Free Trade Agreement. The Court held "that where an agency has no *ability to prevent a certain effect due to its limited statutory authority over the relevant actions*, the agency cannot be considered a legally relevant 'cause' of the effect." *Pub. Citizen*, 541 U.S. at 770, 124 S. Ct. 2204 (emphasis added); *see also id.* at 767, 124 S. Ct. 2204 (analogizing "cause" inquiry for purpose of defining "indirect effects" to proximate cause inquiry in tort law).

Given the similarity in the applicable regulations, we adopt the *Public Citizen* standard for purposes of determining the likely effects of agency action under section 7(a)(2) of the Endangered Species Act. Accordingly, deciding whether the Biological Opinion followed Endangered Species Act regulations defining "indirect effects" requires us to determine whether the EPA can consider and act upon the loss of section 7 consultation benefits in deciding whether to transfer pollution permitting authority to Arizona. If so, then the EPA's transfer decision can be a cause of the loss of section 7 consultation benefits; the loss of those benefits should have been included in the Biological Opinion as an indirect effect of the potential transfer decision; and the loss of those benefits should have been considered and acted upon by the EPA.

2. "Insure that any action . . . is not likely to jeopardize the continued existence of any [listed] species"

Authority over the loss of section 7(a)(2) consultation could be grounded in either the Clean Water Act or the Endangered Species Act. The former option is not presented here,[11] so we focus on whether the obligation in section 7(a)(2) to "insure" against jeopardizing listed species empowers the EPA to make decisions to preserve listed species and their habitat even if the Clean Water Act does not so specify. If so, then the EPA has the authority—indeed, because section 7(a)(2) speaks in mandatory terms, the duty—to deny a pollution permitting transfer application that meets Clean Water Act standards but would jeopardize protected species.

The language in section 7(a)(2) providing that each federal agency "shall . . . insure that any action authorized, funded or carried out by such agency"[12] will not jeopardize listed species or their critical habitat is addressed to each agency, without exception. Our question is: what does it require each agency to do?

The ordinary meaning of "insure" as used in this context requires agencies to take action, as dictionary definitions make clear. To "insure" is "[t]o make (a person) sure (of a thing)" and ("[t]o make certain, to secure, to guarantee (some thing, event, etc.)").[13] VII THE OX-

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[11] No party questioned the EPA's determination that Arizona's transfer application met the Clean Water Act factors. *Cf. Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998) ("EPA's discretion lies . . . in ensuring that those [§ 1342(b)] criteria are met.").

[12] We refer to such actions as "agency actions."

[13] This definition is consistent with those in dictionaries in print at the time Congress enacted the Endangered Species Act in 1973. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE

FORD ENGLISH DICTIONARY 1059 (2d ed. 1989) (emphasis removed). Unless an agency has the authority to take measures necessary to prevent harm to endangered species, it is impossible for that agency to "make certain" that its actions are not likely to jeopardize those species. Otherwise, agencies would be forced to choose between violating section 7's prohibition on agency actions that are likely to jeopardize listed species and acting beyond their powers to protect such species.

The Supreme Court's seminal section 7 case, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978), confirms this textual interpretation:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words *affirmatively* command all federal agencies 'to *insure* that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species. . . .' This language admits of no exception.

466, 731 (2d College Ed. 1972) (defining "insure" as "same as ensure," which is defined as "to make sure or certain; guarantee; secure"). "Insure" has multiple definitions, but the alternatives are inapposite to section 7(a)(2). They include "to pledge one's credit," "to engage by pledge or contract," and "to secure the payment of a sum of money in the event of loss." THE OXFORD ENGLISH DICTIONARY 1059 (2d ed. 1989).

437 U.S. at 173, 98 S. Ct. 2279 (first alteration added, other alterations in original) (citation omitted).[14] An "affirmative command" by a superior authority—here, Congress—ordinarily carries with it both the obligation and the authority to obey that command. For example, despite policy arguments in favor of continuing construction of the dam, the Court in *Hill* relied on Congress's use of "the plainest of words" and section 7's equally plain legislative history, *id.* at 194, 98 S. Ct. 2279, to hold that further construction was in "irreconcilable conflict" with section 7. *Id.* at 193, 98 S. Ct. 2279; *see also id.* at 184, 98 S. Ct. 2279 ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

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[14] The Chamber refers to a case of this court as purportedly limiting *Hill*, *National Wildlife Federation v. Burlington Northern Railroad, Inc.*, 23 F.3d 1508 (9th Cir. 1994). This court cannot, of course, limit any holding of the Supreme Court; only the Court or, for statutory cases, Congress may do that. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

Further, *National Wildlife Federation* was not a case concerning a federal action, and therefore did not raise any section 7(a)(2) issue. Moreover *National Wildlife Federation* merely supports the obvious proposition that a preliminary injunction is an equitable remedy and a court need not grant an injunction "for every violation of law." 23 F.3d at 1512.

Finally, far from abandoning the statutory interpretation in *Hill*, the Supreme Court has since *National Wildlife Federation* relied on and quoted *Hill* in reiterating the conclusion that "Congress[ ] inten[ded] to provide comprehensive protection for endangered and threatened species." *See Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 699, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995).

Hill's analysis of the legislative history of the Endangered Species Act confirms that the authority conferred on agencies to protect listed species goes beyond that conferred by agencies' own governing statutes. *Hill* noted that earlier endangered species legislation, as well as earlier versions of the bills that became the present Endangered Species Act, included the qualifier "insofar as is practicable and consistent with [an agency's] primary purpose." *See* Pub. L. 89-669 § 1(b), 80 Stat. 926 (1966); *Hill*, 437 U.S. at 181 & n.26, 98 S. Ct. 2279. The final version of the statute "carefully omitted [those] reservations," *id.* at 182, 98 S. Ct. 2279, and replaced them with the universal terms of section 7. The "pointed omission" of such qualifications amounted to an "explicit congressional decision to require agencies to afford *first priority* to the declared national policy of saving endangered species." *Id.* at 185, 98 S. Ct. 2279 (emphasis added); *see also id.* at 174, 98 S. Ct. 2279 ("Congress intended endangered species to be afforded the highest of priorities.") (quoted in *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005)).

Another aspect of the statute's structure and history, not directly at issue in *Hill*, bolsters the conclusion that section 7 includes an affirmative grant of authority to attend to protection of listed species within agencies' authority when they take actions covered by section 7(a)(2). Section 7(a)(1) of the Endangered Species Act directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species." 16 U.S.C. § 1536(a)(1). Section 7(a)(2), in contrast, does not refer to agencies' existing "authorities," but instead directs agencies that, when considering covered "actions,"

they are to proceed in a manner not likely to jeopardize listed species.

The House Report indicates that this distinction between the two sections was, as one would expect, deliberate. The Report noted the requirement of present section 7(a)(2) as imposing a "*further require[ment]*" beyond that of section 7(a)(1).[15] *See* H.R. Rep. No. 93-412, at 14 (1973), *reprinted in* 1 CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 153 (1982) [hereinafter LEGISLATIVE HISTORY] (emphasis added). The contrasting language of the two sections indicates that the "further requirement" imposed by section 7(a)(2) turns on the distinction between using *existing* authority to promote conservation of species and conferring an *additional*, do-no-harm obligation—and reciprocal authority—applicable when the agency's *own* actions could cause harm to endangered species.

That Congress so provided is confirmed by Representative Dingell's statement concerning the final bill, relied upon by the Supreme Court as an authoritative statement of section 7's intent:[16] "'[T]he agencies of Government can no longer plead that they can do nothing about [harm to threatened or endangered species]. *They can, and they must. The law is clear.*'"

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[15] This history is consistent with the "canon of statutory interpretation which holds that terms of the same statute are not to be construed so as to be redundant." *Agredano v. Mutual of Omaha Cos.*, 75 F.3d 541, 544 (9th Cir. 1996).

[16] Representative Dingell was the House manager of the Endangered Species Act. *Hill*, 437 U.S. at 183, 98 S. Ct. 2279.

Hill, 437 U.S. at 184, 98 S. Ct. 2279 (quoting 119 Cong. Rec. 42913 (1973), emphasis in *Hill*).[17]

After the Supreme Court decided *Hill* in 1978, Congress amended the Endangered Species Act, creating a narrow exception to section 7's requirements. See Pub. L. No. 95-632, 92 Stat. 3751 (1978). The 1978 amendment did not change section 7's substantive provisions. Instead, Congress created a process by which agencies could apply to an "Endangered Species Committee" for exemptions, § 1536(g), and specified standards by which to judge such applications, § 1536(h). The Senate Report described this exemption as a direct response to *Hill*, stating that *Hill* represented "the type of Federal action which should be eligible for review" for a section 7(g) exemption. S. Rep. No. 95-874, at 2 (1978), *reprinted in* 3 LEGISLATIVE HISTORY, at 940.

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[17] Another portion of Dingell's same statement was quoted in an earlier case of this court, *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081 (9th Cir. 2003), to support the proposition that "[t]here is authority that the [Endangered Species Act] does not grant powers to federal agencies they do not otherwise have." *Id.* at 1085 (citing Hill, 437 U.S. at 183, 98 S. Ct. 2279). The portion of Dingell's statement quoted in *Okanogan* was also quoted in *Hill*, but it is not the Supreme Court's own language. Much more of Dingell's same statement, including the language we quote in the text, appears as well in *Hill*.

To say that "there is authority" regarding a proposition is not to state a holding of this court. There is, as we judges are well aware in our daily work, often conflicting "authority" for any proposition. *Okanogan* had no need to survey, as we do today, all the relevant authority, as it went on to decide the case before it on independent grounds. Because the *Okanogan* panel rested its opinion on other points, it did not decide the question now before us.

The limited exemption created by the 1978 amendments and contained in sections 7(g) and (h) has no direct application here, as the EPA did not apply for it. Its terms, however, serve to confirm that the interpretation of the "insure" requirement in *Hill* remains controlling.

Sections 7(g) and (h) focus on practical concerns, not legal constraints on agency power to protect species. To obtain an exemption, an agency must show that "there are no reasonable and prudent alternatives to the agency action," the benefits of the action "clearly outweigh the benefits of alternative course of action consistent with conserving the species or its critical habitat, and such action is in the public interest," and the action has regional or national significance. § 1536(h)(1)(A)(i)-(iii). Critically, no section 7(g) exemption may be granted until *after* consultation is completed. § 1536(g)(1); 50 C.F.R. § 402.15(c). Thus, at the time consultation occurs, all parties must operate under the assumption that all of section 7(a)(2)'s substantive requirements apply to the action agency. The net effect of the section 7(g) and (h) exemption, then, is to leave the consultation requirement in effect as it was previously; to leave in place the kinds of "agency actions" to which the section 7(a)(2) requirement applies; but to provide a set of procedures and substantive standards for limiting in some circumstances the mandate that agencies "insure" that their actions are not likely to jeopardize listed species.

That the 1978 amendments reiterated rather than retreated from *Hill's* underlying understanding of the Endangered Species Act is confirmed by the history of those amendments. The House Report summarized Congress's understanding of *Hill's* conclusion that "[t]he

pointed omission of any type of qualifying language in the statute revealed congressional intent to give the *continued existence of endangered species priority over the primary missions of federal agencies.*" H.R. Rep. No. 95-1625, 10 (1978), *reprinted in* 2 LEGISLATIVE HISTORY, at 734 (emphasis added). Congress did nothing to alter this conclusion. Instead, in enacting the 1978 amendments, Congress once again refused to adopt an amendment that would have limited section 7 compliance to situations when compliance is "practicable and consistent with [agencies'] primary responsibilities." S. Rep. No. 95-874, at 58-59 (1978), 3 LEGISLATIVE HISTORY at 996-97. Congress's rejection of this amendment underlines its continued understanding, consistent with *Hill*, that section 7(a)(2) specifies that agencies must *when acting affirmatively* refrain from jeopardizing listed species, even if the agency's governing statute does not so provide. The only exception to this rule lies in a section 7(g) exemption.

We conclude that the obligation of each agency to "insure" that its covered actions are not likely to jeopardize listed species is an obligation in addition to those created by the agencies' own governing statute. The next question we must decide is whether the EPA's transfer decision is the kind of agency action to which that obligation applies.

3. Actions "authorized, funded, or carried out" by an agency

As we interpret section 7(a)(2) in light of the case law, the Endangered Species Act confers authority and responsibility on agencies to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by

earlier agency commitments. The decision to approve a state's pollution permitting transfer application meets these criteria and is thus the sort of decision to which section 7(a)(2) applies. The Biological Opinion's reasoning that the EPA had no choice but to disregard the impact of the transfer on listed species in Arizona was therefore inconsistent with the statute.

Section 7(a)(2) applies to all agency actions "authorized, funded, or carried out" by the agency in question. This language does indicate that some agency actions are not covered—those the agency does *not* "authorize[ ], fund[ ], or carr[y] out." Our determination as to whether the transfer decision is covered thus depends on the meaning of those terms.[18]

The regulatory provision that delineates the actions covered by section 7(a)(2) reads: "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Although there is no statutory reference to "discretionary involvement or control," there is the limitation, just noted, to actions "authorized, funded, or carried out" by the agency. As that limiting language is the only possible source for the regulation's "discretionary" qualification of "all actions," we take the regulation as a gloss on what the statutory limitation means and interpret the term "discretionary" accordingly.

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[18] Because we conclude that approving Arizona's application is an "authorizing" action, and because no party argued that the EPA's use of some other authority—such as its grant-making authority, *see* 33 U.S.C. § 1256, which helped Arizona implement the pollution permitting program—we do not decide whether any action besides the transfer decision triggered section 7(a)(2).

Arizona and the Chamber note that the Clean Water Act specifies that the EPA "shall approve" state applications that meet certain enumerated factors. 33 U.S.C. § 1342(b). They argue that this language precludes EPA "discretion" to act on behalf of listed species, and that, applying 50 C.F.R. § 402.03, section 7 does not apply. However, "an agency cannot escape its obligation to comply with the [Endangered Species Act] merely because it is bound to comply with another statute that has consistent, complementary objectives." *Wash. Toxics*, 413 F.3d at 1032. Applying this principle, we reject, for two reasons, Arizona and the Chamber's argument that § 1342(b) of the Clean Water Act eliminates any obligation to follow section 7(a)(2) of the Endangered Species Act.

First, the EPA makes no argument that its transfer decision was not a "discretionary" one within the meaning of 50 C.F.R. § 402.03. Indeed, it could not so argue for, as we have seen, the agency recognizes that it had a duty to consult, a duty the regulations would preclude if the federal involvement in or control of the transfer decision was not sufficiently "discretionary." We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. *See Chenery I*, 318 U.S. at 87, 63 S. Ct. 454; *see also Gifford Pinchot Task Force*, 378 F.3d at 1072 n.9. Further, we ordinarily defer to an agency's interpretation of its own regulation. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220, 121 S. Ct. 1433, 149 L. Ed. 2d 401 (2001). As the EPA evidently does not regard § 402.03 as excluding the transfer decision, we should not so interpret the regulations.

Second, cases applying § 402.03 are consistent with our understanding that the regulation's reference to "discretionary . . . involvement" is congruent with the statutory reference to actions "authorized, funded, or carried out" by the agency. Put another way, imposing section 7(a)(2)'s substantive requirements in those cases would have gone beyond the limited command of the statute.

Our § 402.03 "discretionary . . . involvement or control" cases hold section 7(a)(2) inapplicable if the agency in question had "no ongoing regulatory authority" and thus was not an entity responsible for decisionmaking with respect to the particular action in question. *Wash. Toxics*, 413 F.3d at 1033. For example, we have relied on the "discretionary . . . involvement" regulation to find section 7(a)(2) inapplicable where the agency lacked any decisionmaking authority over the action of the kind challenged. *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding that the action at issue fell outside the agency's authority because the risk of harm to listed species arose from the President's decision regarding the Navy's nuclear submarine force, not the Navy's obedience to that order); *see also Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (holding section 7(a)(2) inapplicable where a different agency made the ultimate decisions, while the respondent agency "merely provided advice," without authorizing, funding or carrying out anything). Other cases have found section 7(a)(2) inapplicable where the challenged action was legally foreordained by an earlier decision, such as where the agency lacked the ability to amend an already-issued permit "to address the needs of endangered or threatened species." *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d

1073, 1082 (9th Cir. 2001) (cited in *Wash. Toxics*, 413 F.3d at 1032) (applying § 402.16, which has similar language to § 402.03); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (cited in *Wash. Toxics*, 413 F.3d at 1032) (holding that section 7(a)(2) did not apply because the agency had no "[ ]ability to influence" a project based on a right-of-way granted prior to the Endangered Species Act's enactment).

In contrast, we have held that section 7(a)(2) does apply where the agency in question had continuing decisionmaking authority over the challenged action. *See Wash. Toxics*, 413 F.3d at 1032 (holding that section 7(a)(2) applies to the EPA's registration of pesticides because of its "ongoing discretion to register pesticides, alter pesticide registrations, and cancel pesticide registrations"); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003) (holding that section 7(a)(2) applies to the granting of permits—a quintessential "authorizing" action—for future fishing); *see also Sierra Club*, 65 F.3d at 1508 (citing *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995), and noting that section 7 applies to already-approved projects "if the project's implementation depended on an additional agency action"); *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1082; *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (holding that section 7(a)(2) applies to "renewal of water contracts" because the agency had power to set the terms of—that is, to "authorize"—the renewed contracts, and was not bound to reaffirm merely the previously-negotiated terms); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (holding that section 7(a)(2) did apply when there was "ongoing agency action" in that the

agency retained power to authorize and carry out land use decisions).

In sum, we understand our cases applying the "discretionary . . . involvement" regulation to interpret that regulation to be coterminous with the statutory phrase limiting section 7(a)(2)'s application to those cases "authorized, funded, or carried out" by a federal agency. Where a challenged action has not been "authorized, funded, or carried out" by the defendant agency, we have held that section 7(a)(2) does not apply. Where the challenged action comes within the agency's decisionmaking authority and remains so, it falls within section 7(a)(2)'s scope.[19]

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[19] The dissent concludes that because the Clean Water Act requires the EPA to consider a list of nine requirements when evaluating a state's pollution permitting transfer application, the EPA had no discretion to reject Arizona's application on Endangered Species Act grounds. The EPA has repeatedly taken the position that the question whether the EPA has sufficient discretion, applying 50 C.F.R. § 402.03, under the Endangered Species Act is not before us and has twice asked us to remand any question concerning such discretion. *See* EPA CR 28(j) letter of July 27, 2005 ("EPA did consult. The only issue before this Court is the adequacy of that consultation. For the same reason, the Court should not reach the question regarding whether the EPA has sufficient discretion to trigger consultation regarding the approval of the transfer of 402 permitting authority to the State."); EPA CR 28(j) letter of Aug. 4, 2005 ("Respondents again emphasize that the issue of whether or not the [EPA] can properly rely on 50 C.F.R. § 402.03 in deciding whether or not it must consult regarding its approval of the State of Arizona's Clean Water Act 402 Permitting Program is not before the Court in this case because EPA did consult regarding the approval of the program."). As noted in Part III.B, *supra*, the EPA has taken contradictory positions regarding its section 7(a)(2) obligations. The dissent does not explain its disagreement with that portion of our opinion.

The dissent argues that we should nonetheless affirm the EPA's

Like the agencies in *Washington Toxics*, *Pacific Rivers* and *Houston* but not the other § 402.03 cases noted above, the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation and action requirements.

4. Other Circuits

Although *Washington Toxics* and the cases are fully consistent with our analysis, this case is the first in which we have specifically addressed the question whether section 7(a)(2) of the Endangered Species Act provides a modicum of additional authority to agencies, beyond that conferred by their governing statutes, to protect listed species from the impact of affirmative federal actions. Other circuits, however, have considered the question. The reasoning of those opinions reflects an existing intercircuit conflict on the question before us, with two circuits reading section 7(a)(2) as we do and two concluding that section 7 does not itself authorize agencies to protect listed species even when it is their own action that is jeopardizing then. *Compare Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989), *and Conservation Law Found. v. Andrus*, 623

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action based on § 402.03 because the question is one of statutory interpretation. But that is simply not so: § 402.03 is a regulation, *not* a statute. The dissent offers no analysis of the key *statutory* provision, section 7(a)(2) of the Endangered Species Act, nor does it offer any response to our interpretation of the plain language, intent and history of that section. Although the dissent does offer an interpretation of the Clean Water Act, that interpretation only matters if we are wrong about section 7(a)(2) of the Endangered Species Act and the EPA was wrong under 50 C.F.R. § 402.03 in consulting about the transfer of permitting authority.

F.2d 712, 715 (1st Cir. 1979) *with Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 294, 298-99 (5th Cir. 1998), *and Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). We do not find the D.C. Circuit and Fifth Circuit cases persuasive, as they do not reflect a full consideration of the text and history of section 7(a)(2).

The First Circuit, writing a year after the Supreme Court decided *Hill*, noted that the Endangered Species Act "will continue to apply of its own force to major actions taken by the [agency]," regardless of the contents of the specific statute under which the agency acted. *Conservation Law Found.*, 623 F.2d at 715. Thus, although the governing statute in that case may have contained standards "less stringent than those of the [Endangered Species Act]" with regard to the protection of listed species, "[t]he [Endangered Species Act] by its terms applies to all action by the Secretary." *Id.* Consequently, "[i]f [the secretary] cannot . . . insure that exploration will not jeopardize the continued existence of [listed species], he will not approve exploration plans." *Id.*

A decade later, the Eighth Circuit echoed *Conservation Law Foundation*, writing that "[e]ven though a federal agency may be acting under a different statute, that agency must still comply with the [Endangered Species Act]." *Defenders of Wildlife*, 882 F.2d at 1299; John W. Steiger, *The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs*, 21 ECOLOGY L.Q. 243, 274 (1994) (describing as "well established" the proposition that "section 7(a)(2) provides an independent source of

authority that is in addition to the authority the Agency is granted in its programmatic statutes").

The D.C. Circuit has indicated that the Endangered Species Act does not empower an agency to impose conditions on an interim, annual license that, unlike the pollution permitting transfer decisions at issue here, the agency was obliged to issue without any deliberation. In so concluding, the D.C. Circuit noted in passing the language of section 7(a)(2), but reasoned that section 7(a)(1) instructs agencies to "utilize their authorities," and that this section 7(a)(1) language "does not *expand* the powers conferred on an agency by its enabling act." *Platte River*, 962 F.2d at 34 (emphasis in original).

Platte River did not recognize the obvious differences between section 7(a)(1) and 7(a)(2) in both language and purpose. The D.C. Circuit did not, for example, discuss at all the meaning of the term "insure" in section 7(a)(2), absent from section 7(a)(1). Nor did it notice the difference between affirmative agency attempts to protect listed species (section 7(a)(1)) and a do-no-harm directive pertaining to affirmative agency actions with likely adverse impact on listed species (section 7(a)(2)). Finally, the D.C. Circuit in *Platte River* did not mention the availability of exemptions from section 7(a)(2) under the 1978 amendments, or the repeated decision of Congress not to approve proposed amendments that would have limited the reach of section 7(a)(2) so as to accord with the D.C. Circuit's reading of the unamended statute. For all these reasons, we do not find *Platte River*'s cursory consideration of the question persuasive.

The Fifth Circuit relied on *Platte River* to hold that section 7(a)(2) does not permit the EPA to require a state to consult with FWS before issuing a water pollution per-

mit. *Am. Forest & Paper Ass'n*, 137 F.3d at 294, 298-99. While we do not pass on the precise question decided in *American Forest*, we do note that, aside from the deficiencies of *Platte River* on which the Fifth Circuit relied, *American Forest* rested on a fundamental misconception concerning section 7(a)(2): The Fifth Circuit stated that it is "largely beside the point" whether the EPA's transfer decision is an "agency action," because "[e]ven if EPA were required to consult with the agencies . . . EPA lacks authority to" require states to protect listed species. *Id.* at 298 n.6. Section 7(a)(2), however, specifies that *if* an agency is contemplating a covered "agency action," it has an obligation *both* to consult and to "insure" against taking action likely to jeopardize species. The Fifth Circuit's notion that the consultation and assurance aspects of the statute are independent is simply incorrect.

In sum, the better reasoned out-of-circuit authority, as well as our own precedent, supports our conclusion that section 7(a)(2) independently empowers EPA to make pollution permitting transfer decisions on behalf of listed species and their habitat when undertaking covered actions.

5. Summary

We hold that approving Arizona's pollution permitting transfer application was an agency action "authorized" by the EPA, thus triggering both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. The EPA may have complied with its obligations under the Clean Water Act, but compliance with a "complementary" statute cannot relieve the EPA of its independent obligations under section 7(a)(2). *See Wash.*

Toxics, 413 F.3d at 1033. Section 7(a)(2) imposes a duty on the EPA to "insure" its transfer decision is not likely to jeopardize protected species or adversely modify their habitat, and this duty exists alongside Clean Water Act provisions as the agency's "first priority." *Hill*, 437 U.S. at 185, 98 S. Ct. 2279.

We therefore conclude that, under *Public Citizen*, the EPA's transfer decision will cause whatever harm may flow from the loss of section 7 consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer.[20] The Biological Opinion, which ignored this effect while recognizing that section 7 consultations concerning pollution permitting permits have saved species' critical habitat in the past, was therefore deficient. The EPA erred by relying on this fatally deficient Biological Opinion.

D. *Other bases for the EPA's transfer decision*

Having concluded that the Biological Opinion upon which the EPA relied was flawed in its basic legal premise,[21] we now consider whether that Opinion's other analyses, or any analysis outside the Biological Opinion that the EPA relied upon, saves the validity of the EPA's transfer decision.

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[20] Defenders also challenge the Biological Opinion and the EPA for failing to analyze the "cumulative effects" of the pollution permitting transfer, as required by Endangered Species Act regulations. *See* 50 C.F.R. § 402.14(g)(3) (requiring consideration of "cumulative effects"); § 402.02 (defining "cumulative effects"). As we consider the loss of section 7 consultation benefits on future permits an "indirect effect" of the EPA's transfer decision, we need not consider Defenders' argument that the EPA and Biological Opinion should have also considered that effect as part of a "cumulative effect."

[21] *See supra*, Parts III(B)-(C).

1. No "detailed discussion" of effects on all listed species

Consistent with its underlying legal analysis, the Biological Opinion never considered in any detail the likely real-world impact of the transfer decision on listed species in Arizona. The failure to conduct that inquiry fatally infects the Opinion's truncated alternative causation analysis.

50 C.F.R. § 402.14(h)(2) requires a biological opinion to include a "detailed discussion of the effects of the action on listed species or critical habitat." The Biological Opinion on which the EPA relies does not do so. Instead, it refers to a website summarizing listed species' *status*, but includes no discussion of how the pollution permitting transfer might affect any particular species. The Biological Opinion concludes that the transfer will not likely jeopardize *any* species—but only because, once again, "it is not the proposed action itself that is jeopardizing these species."

Defending the Biological Opinion, the Home Builders argue that the "effects of the action"—which the Biological Opinion must consider under 50 C.F.R. § 402.14(h)—exclude the impact of Arizona water pollution permits on terrestrial species.[22] Neither the Biological Opinion nor

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[22] The record indicates that a large portion of permits issued by ADEQ—up to 20,000 permits annually—will be for "stormwater construction [discharges]." This reference is to storm water that flows over a construction site, picking up various pollutants and carrying them across terrestrial and eventually into aquatic habitat. *Stormwater Discharges from Construction Activities*, EPA-NPDES, *at* http://cfpub1.epa.gov/npdes/stormwater/const.cfm?program—id=6 (last visited July 5, 2005). Such permits relate to the construction itself, not to a discrete discharge during construction. As a practical matter, a developer could not perform any construction activities without such a permit.

the EPA, however, used this argument to support the agency action. We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. *See Chenery I*, 318 U.S. at 87, 63 S. Ct. 454; *see also Gifford Pinchot Task Force*, 378 F.3d at 1072 n.9. Accordingly, we need not decide the merits of the Home Builders' argument.

It is understandable that EPA has not embraced the Home Builders' analysis. According to the Home Builders, the section 7 consultations and EPA-requested mitigation undertaken in the past regarding *federal* pollution permits were improper, because the EPA took into account as indirect effects the long-run impact of development on terrestrial upland species. This argument is based on a flawed reading of Endangered Species Act regulations.

A Biological Opinion must discuss the effects of an agency action, § 402.14(h), including the action's direct effects, indirect effects, and "effects of other activities that are interrelated or interdependent with that action," meaning those actions "that are a part of a larger action and depend on the larger action." § 402.02. If a construction project cannot go forward without a water pollution permit, then the entire project is "interrelated or interdependent" with the proposed discharge and must be considered in a Biological Opinion.

The Home Builders cite a different regulation, requiring a more limited analysis. *See* § 402.12(c), (d)(2) (describing requirements of a biological assessment to include only discussion of effects on listed species and habitat in the "action area"). But that limited analysis applies to what an action agency must do *before* formal section 7 consultation begins, and does not excuse agencies

from other section 7 requirements that consultation may trigger.

The Home Builders also cite cases relating to portions of development projects that "could exist independently of each other." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116 (9th Cir. 2000). Seemingly, the Home Builders argue that, because section 7 does not require consultation or mitigation with regard to a development project truly independent of the one covered by a permit, section 7 also does not cover development projects that *are* dependent on the permit in question. On the contrary, section 7 covers development projects "interrelated or interdependent with" the discharge permitted by a permit, and therefore covers in many instances the development that will take place if construction-connected stormwater discharge is permitted.

Neither the FWS nor the EPA makes any argument that justifies the Biological Opinion's failure to analyze, in detail, the likely effect of such future development projects fostered by pollution permits on specific species. This failure is especially telling in light of the benefits of section 7 consultation regarding water pollution permits. That consultation, as the Biological Opinion noted, has led various developers to alter their development plans, preserving thousands of acres of listed species' habitat. For example, such mitigation has "maintain[ed] dispersal and movement corridors" for the pygmy owl. FWS staff had noted that the absence of section 7 consultation could harm specific species, yet the Biological Opinion did not spell out those concerns in any detail.

By not considering the transfer's specific impact on listed species—at least those as to which specific con-

cerns had been expressed—the Biological Opinion "failed to consider an important aspect" of the transfer decision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

2. Alternatives to section 7 consultation

The Biological Opinion notes state and federal endangered species protections that exist without section 7 consultation, including: (1) the Memorandum of Agreement between the EPA and FWS, EPA oversight over ADEQ; (2) the Endangered Species Act's anti-take provisions; and (3) Arizona state law. The EPA relies on these protections as sufficient to assure against jeopardizing listed species. None of these protections, however, are sufficient substitutes for section 7's consultation and mitigation mandates.

a. Memorandum of Agreement

The Memorandum of Agreement provides the closest substitute for the provisions of section 7. It cannot, however, replace section 7, because it does not grant the federal government any authority to require Arizona to engage in the kind of consultation and mitigation measures EPA had conducted before the transfer.

Under the Memorandum, the EPA will review ADEQ permits and identify those that "may raise issues regarding" listed species. 66 Fed. Reg. 11,202, 11,216 (Feb. 22, 2001). For projects posing a significant threat to listed species, the FWS "will work with the State . . . to reduce the detrimental effects stemming from the permit." *Id.* The FWS, however, has no statutory authority to mandate that the state revise any problematic permits, nor does the EPA. In contrast, all federal agencies have

a duty, in consultation with the FWS, to ensure that their actions are not likely to jeopardize any listed species or their designated habitat. § 1536(a)(2).

The Memorandum also provides that the "EPA will use the full extent of its CWA [Clean Water Act] authority to object to a State . . . permit where EPA finds . . . that a State . . . permit is likely to jeopardize" listed species. 66 Fed. Reg. at 11,216. However, the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species; the EPA has that authority only when one also considers the Endangered Species Act.[23] As a result, Endangered Species Act concerns raised by a permit are cognizable under the Clean Water Act only fortuitously, if at all. Unless the EPA is willing to use the authority granted by section 7 in addition to that accorded by the Clean Water Act, the EPA's ability to object to permits and thereby conserve listed species will be quite limited.

In sum, the Memorandum calls for the EPA and the FWS to *discuss* listed species matters with ADEQ, but relies on ADEQ *voluntarily* to cooperate with those federal agencies. We assume that ADEQ will consider any listed species issues raised in good faith. Nothing in the record, however, indicates that ADEQ even has authority under state law to *require* permit applicants to protect

[23] Pollution permitting standards that apply to both federal permits, 33 U.S.C. § 1342(a), and state permits, § 1342(b)(1)(A), incorporate concerns for the effect of pollutants on *aquatic* species living in waterways affected by water pollution. *See, e.g.*, 33 U.S.C. § 1317(a)(1) (listing effect of toxic pollutants on "affected organisms in any waters" as a factor to consider in issuing permit). These powers do not extend to terrestrial species, nor do they include section 7(a)(2)'s *prohibition* on agency actions that are likely to jeopardize listed species.

listed species. Section 7 thus provides protection for species that reliance on purely voluntary action by the state cannot supply.

b. EPA oversight

For similar reasons, EPA oversight under 33 U.S.C. § 1342(c) provides a weak substitute for section 7 consultation. Such oversight relates to different substantive standards—those of the Clean Water Act, rather than the Endangered Species Act. The Clean Water Act standards governing permitting decisions will not directly relate to protection of most—if any—listed species, and so cannot substitute for section 7 coverage.

c. Endangered Species Act anti-take provisions

The Endangered Species Act makes it a crime to "take" any species listed as endangered, defining "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1538(a); 16 U.S.C. § 1532(19). The Supreme Court has upheld regulations that define "take" to include any act "which actually kills or injures wildlife," where such acts may include "significant . . . modification or degradation" of listed species' habitat.[24] *See Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 691, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (upholding 50 C.F.R. § 17.3). Section 10 of the

[24] The regulation defines "[h]arm in the definition of 'take' in the Act [as] an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

Endangered Species Act creates an "incidental take" permit program pursuant to which the Secretary of Interior may grant permits for activity—such as some construction projects—that may incidentally "take" an endangered species specimen, so long as the permittee sufficiently mitigates the risk of a take. *See* 16 U.S.C. § 1539. These anti-take provisions apply to all actors, not only the federal government. § 1538(a)(1). Accordingly, private developers are subject to sections 9 and 10 regardless of whether the EPA or a state government issues the developers' water pollution permits.

Sections 9 and 10 are important provisions, but they are not substitutes for section 7 coverage. Section 7 covers *any* federal agency action that could *threaten* species or their critical habitat. While the anti-take provisions prohibit "[e]liminating a threatened species' habitat," *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1075, or "significant . . . modification or degradation where it actually kills or injures wildlife," 50 C.F.R. § 17.3, the effectiveness of these prohibitions depends on their enforcement by the appropriate authorities. "[T]he Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured." *Sweet Home*, 515 U.S. at 703, 115 S. Ct. 2407. Accordingly, after-the-fact enforcement cannot prevent threats to listed species the way section 7 can. Prevention of takings may come from the section 10 permitting process, but private parties *choose* whether to pursue a section 10 incidental take permit. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000). Private parties only have an incentive to do so if there is a meaningful threat of section 9 enforcement.

On this record, there is no indication that section 9 is or will be enforced meaningfully enough to provide a suf-

ficient substitute for section 7. The record reflects no instances in which FWS has initiated a section 9 enforcement action with regard to listed species in Arizona. Additionally, FWS staff stated in the Interagency Elevation Document that they did "not believe that section 9 enforcement is an acceptable substitute for section 7 consultation." This opinion reflected staff concerns, expressed in internal emails, that section 9 is ill-suited to protect species such as the pygmy owl, whose numbers are so low that section 9 enforcement may come too late to prevent extinction. The Biological Opinion contains no indication the FWS will increase section 9 enforcement nor any other analysis alleviating FWS staff concerns. The absence of record evidence of section 9 enforcement is confirmed by our own research, which reveals public notices regarding only two applications for incidental take permits for projects occurring in Arizona since January 1, 2001. *See* 69 Fed. Reg. 75,556 (Dec. 17, 2004); 69 Fed. Reg. 15,362 (Mar. 25, 2004). Compared to the large number of construction projects in the state, this low number suggests that developers do not feel that section 9 enforcement is sufficiently likely for them to apply for section 10 permits.

d. Arizona state law

The Biological Opinion notes one Arizona law that prohibits the taking of "native plants"—which, the Opinion notes, includes endangered or threatened plants—from any land within the state without following certain procedures. *See* Ariz. Rev. Stat. § 3-904. The Opinion implies that this law partially fills a gap left open by the Endangered Species Act, which limits the taking of endangered plants on federal land only, not all land. *See* 16 U.S.C. § 1538(a)(2)(B).

The Arizona statute, however, is not an adequate substitute for section 7(a)(2)'s limitation on granting permits that could jeopardize listed species. As the Biological Opinion notes, the Arizona statute merely requires private landowners to notify a state agency of plans to destroy certain plants on their property and regulates when that destruction may take place. *See* Ariz. Rev. Stat. § 3-904. It does not prohibit such destruction, or set standards to be taken into account in the issuance of water pollution permits. The Biological Opinion does not discuss the standards that govern Arizona's regulation of native plant takes, and does not indicate that Arizona considers the listed status of plants for federal purposes in granting native plant take permits.

In sum, the Biological Opinion fails to provide a reasoned explanation concerning why Arizona's native plant law adequately substitutes for section 7, even for plants. As it obviously does not do so for animals, § 3-904 is no substitute for section 7(a)(2) of the Endangered Species Act.

3. The EPA's reliance on the Biological Opinion

The EPA had an independent duty under section 7(a)(2) to ensure that its pollution permitting transfer decision was not likely to jeopardize listed species or adversely modify their habitat. Arbitrarily and capriciously relying on a faulty Biological Opinion violates this duty. *Res. Ltd.*, 35 F.3d at 1304; *Pyramid Lake*, 898 F.2d at 1415.

When considering challenges to agency actions based on *factual* objections to the Biological Opinion, however, we have held that an agency can satisfy the arbitrary and capricious standard of review even if it relies on an "admittedly weak" Biological Opinion, if there is no "infor-

mation the Service did not take into account which challenges the [biological] opinion's conclusions." *Id.*; *see also Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). This holding is based on the notion that action agencies should be able to rely on the expert judgments that underlie most Biological Opinions. *See id.* (twice noting reasonableness of action agency's reliance on "the *expert* agency") (emphasis added). Here, however, the Biological Opinion's flaws are *legal* in nature. Discerning them requires no technical or scientific expertise. The EPA should have understood the legal errors of the Biological Opinion's analysis. Its failure to do so led to an action based on reasoning "not in accordance with law" and is thus arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A).

Even applying the *Pyramid Lake* standard, the EPA acted arbitrarily and capriciously. Information not considered by the Biological Opinion that challenges its conclusion includes FWS staff members' articulated, specific concerns about the impact of the loss of section 7 consultation, supported by information regarding the effect of past section 7 consultations.

The EPA notes that it relied on two pieces of evidence supporting its conclusion *beyond* that contained in the Biological Opinion and argues that consideration of this evidence provided the reasoned consideration that the arbitrary and capricious standard requires.[25]

The first such evidence is the EPA's own Biological Evaluation. This report focused largely on Clean Water

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[25] Any explanation for its decision based on facts or reasoning not in the Biological Opinion must, of course, satisfy the EPA's substantive obligations under section 7(a)(2) and the arbitrary and capricious standard of review discussed above.

Act requirements and devoted only a few pages to endangered species. The report summarizes the EPA-FWS Memorandum of Agreement, Endangered Species Act anti-take provisions, EPA oversight of ADEQ's permit program, and Arizona's native plant laws, without addressing their limitations, discussed above. The report's "Discussion of Effects" notes the loss of section 7 consultation, but otherwise focuses on Clean Water Act compliance and repeats the protections afforded by other programs. It does not discuss the impact on listed species of the loss of section 7 consultation and mitigation and so adds nothing to the Biological Opinion.

The second piece of evidence on which the EPA relies is an "assurance[ ] from the Arizona Game and Fish Department . . . that Federally-listed species would not suffer" from the lack of section 7 consultations. This document is from an Arizona official of a state department that is *not* the one that will issue Clean Water Act permits. He writes that the EPA-FWS Memorandum of Agreement "will serve as a guideline for . . . Arizona to ensure that [pollution] permits will not negatively impact endangered and threatened species."

There is no indication that Arizona would be bound by this letter. The ADEQ, the agency primarily responsible for implementing Arizona's pollution permitting authority, has not subscribed to its assurances. Nor does the letter writer explain by what authority Arizona will "ensure that . . . permits will not negatively impact endangered and threatened species," or indicate that his agency has any authority to do so, let alone authority as broad as the protections mandated by the Endangered Species Act as applied by the EPA.

In the abstract, voluntary compliance by state agencies willing to follow FWS recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

Given its serious faults, the independent evidence on which EPA relies cannot fill in the crucial gaps in the Biological Opinion. Neither the Biological Opinion nor the EPA, consequently, adequately considered indirect effects of the transfer. The EPA thus "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856. Because neither the Biological Opinion nor the EPA examined all relevant data, the EPA's transfer decision was arbitrary and capricious.

4. Summary

The EPA's most serious errors were (1) its failure to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat and (2) its failure to discuss the specific effects of its decision on the various listed species present in Arizona. It is possible that some combination of state and federal protections for listed species and state agency cooperation with the federal Memorandum of Agreement might sufficiently replace the benefits of section 7 consultation so that no harm to listed species would be "reasonably certain to occur" as a result of losing section 7 consultation. 50 C.F.R. § 402.02. But the EPA could not so conclude without specifically analyzing each listed species within Ari-

zona and without more certain assurances of voluntary state cooperation from officials at *all* relevant Arizona agencies, as well as a more careful consideration of the actual protection accorded by other federal and state statutory provisions and the Memorandum of Agreement.

IV. Remedy

Typically, when an agency violates the Administrative Procedure Act and the Endangered Species Act, we vacate the agency's action and remand to the agency to act in compliance with its statutory obligations. In certain instances, however, "when equity demands, the [challenged action] can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

We have carefully considered whether equitable considerations warrant allowing Arizona to maintain its authority over pollution permitting decisions while the EPA "follows the necessary procedures," beginning with consultations with the FWS based on legal understandings consistent with this opinion. Arizona has undoubtedly expended significant funds to obtain and implement pollution permitting authority and granted a significant number of permits pursuant to this authority.[26] We cannot reverse the expenditure of those funds nor the issu-

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[26] For instance, one type of water pollution permit issued by Arizona under its pollution permitting authority, stormwater discharge permits, account for approximately 20,000 permit applications annually. ARIZ. DEP'T OF ENVT'L QUALITY, *ADEQ Director Steve Owens Unveils a Web-based System to Apply for Stormwater Discharge Permits*, at http://www.azdeq.gov/function/news/2003/june.html#609 (last visited July 5, 2005).

ance of those permits. We further recognize the administrative difficulties in transferring a program like pollution permitting from Arizona back to the EPA and very possibly back to Arizona again. Based on the desire of Arizona to keep its pollution permitting authority and the record of other states obtaining and maintaining their own pollution permitting authority, even after full consultation regarding the transfer's effect on endangered and threatened species, *see supra* note 3, it seems likely that Arizona will again apply for pollution permitting authority. Finally, we note that all of the actors in this case—Arizona, the EPA, and FWS—operated in a somewhat murky legal environment. Faced with two circuit court cases suggesting that the EPA lacked authority to make pollution permitting transfer decisions based on Endangered Species Act concerns, "the extent of doubt whether the agency chose correctly" was not insignificant. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

Other factors, however, weigh heavily in favor of vacating the EPA's approval of Arizona's transfer application. As noted above, Arizona annually issues tens of thousands of pollution permits pursuant to the EPA's action. *See supra* note 22. We have concluded that, absent section 7 coverage, we have no strong assurances that these permits will not allow development projects that are likely to jeopardize listed species or adversely modify their habitat. The purpose of the Endangered Species Act—to conserve endangered and threatened species rather than allow them to go extinct, *see* 16 U.S.C. § 1531—renders the risk of harm to listed species too great. This is particularly true in this case, in which the record suggests that one species—the pygmy owl—numbers less than 100. Temporary harms while the

agency "follow [ed] the necessary procedures," *Idaho Farm Bureau*, 58 F.3d at 1405, could lead to the permanent harm of extinction. *See id.* (noting "the potential extinction of an animal species" as a crucial factor to consider when determining whether a challenged agency action should be vacated). Our concern with the risk of extinction comports with our understanding of the Endangered Species Act's "institutionalized caution mandate." *Wash. Toxics*, 413 F.3d at 1030 (quoting *Sierra Club*, 816 F.2d at 1389). Without greater assurances that harm to listed species would not occur, our "institutionalized caution" makes us unwilling on the present record to order any remedy other than vacation of the EPA's approval of Arizona's transfer application.

For the just-stated reasons, we vacate the EPA's decision to approve Arizona's pollution permitting application. Pursuant to 28 U.S.C. § 1631, we transfer Defenders' Endangered Species Act and Administrative Procedure Act suit challenging the validity of the Biological Opinion to the district court where it was originally filed for proceedings consistent with this opinion. The petition for review is GRANTED and REMANDED to the EPA for proceedings consistent with this opinion.

THOMPSON, Senior Circuit Judge, dissenting:

Because I disagree with the conclusion in Part III of the majority opinion that the EPA had the authority to consider the impact on endangered and threatened species in making its decision to transfer administration of the pollution permitting system to the State of Arizona, I respectfully dissent.

As the majority observes, the requirements of section 7 of the Endangered Species Act "apply to all [agency] actions in which there is discretionary Federal involve-

ment or control." 50 C.F.R. § 402.03. "Where there is no agency discretion to act, the [Endangered Species Act] does not apply." *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998). We have previously held that an agency lacks the requisite discretion to act when the agency does not have the authority to take action on behalf of endangered or threatened species. *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (where agency lacks discretion, to require compliance with section 7 of the Endangered Species Act "would be an exercise in futility"); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) ("[T]he discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species. If no discretion to act is retained, then consultation would be a meaningless exercise.") (internal citation omitted); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) ("[W]here . . . the federal agency lacks the discretion to influence the . . . action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species.").

The majority interprets the "discretionary involvement" language of 50 C.F.R. § 402.03 to be "coterminous with" all actions "authorized, funded, or carried out" by a federal agency. Stated differently, the majority now holds that *any* action which comes within a federal agency's decisionmaking authority falls within the scope of section 7(a)(2) of the Endangered Species Act. In my view, our cases do not take such an expansive view of the meaning of § 402.03. Rather, we have consistently recognized that an agency may have decisionmaking authority

and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered or threatened species. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074-75 (9th Cir. 1996) (federal agency's decision to consult with and to provide advice to private entity was not discretionary agency action triggering section 7); *Sierra Club v. Babbitt*, 65 F.3d at 1508-1510 (holding that although the Bureau of Land Management retained the right to object to a road development project in three specified circumstances, "the agency simply [did] not possess the ability to implement measures that inure to the benefit of the protected species."); *cf. Turtle Island Restoration Network*, 340 F.3d at 975 (concluding that Congress' decision to use the words "'including but not limited to'" in the statute granting the Fisheries Service the authority to issue fishing permits "contemplated that the list of potential obligations that the United States had under the Agreement was not exhausted by those listed in the subsection").

Here, the EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not "agency action" within the meaning of section 7 of the Endangered Species Act.[1] The Clean Water Act, by its very terms, per-

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[1] The majority concludes that pursuant to *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) (*Chenery I*), it may not deny the petition for review on this basis because the EPA did not contend that it lacked discretion to consult under section 7 in conjunction with the transfer of pollution permitting authority to Arizona. We have, however, previously declined to take such a broad view of *Chenery* and instead have observed that although "[g]enerally, a reviewing court may only judge the propriety of an agency's decision on the grounds invoked by the agency, . . . the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute."

mits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements, the EPA administrator "shall approve" the program. 33 U.S.C. § 1342(b). This Congressional directive does not permit the EPA to impose additional conditions. Although the majority quite properly concludes that a federal agency cannot escape its obligation to comply with section 7 of the Endangered Species Act when it is "bound to comply with another statute that has consistent, complementary objectives," *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), here, the EPA has an obligation to evaluate the state's application against nine *exclusive* requirements. 33 U.S.C. § 1342(b); *see also Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of § 1342(b)] is firm: . . . 'Unless the Administrator of EPA determines that the proposed state program does not meet [the specified] requirements, he must approve the proposal.'") (quoting *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977)); *Nat'l Res. Defense Council v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (observing that "[t]he [Clean Water Act] specifies prerequisites for state assumption of the program . . . and commands the Administrator to approve the state permit

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Ry. Executives' Ass'n v. ICC, 784 F.2d 959, 969 (9th Cir. 1986). The majority's conclusion further disregards our obligation to review an agency's statutory mandate de novo, *see Portland Adventist Med. Ctr. v. Thompson*, 399 F.3d 1091, 1095 (9th Cir. 2005); *see also Am. Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000) (noting that review of "substantive issues of statutory construction" "proceed[s] along [a] different analytic path[ ]" and is "subject to [a] separate standard[ ] of review" than review of an agency's compliance with procedural requirements), and, in doing so, to "give effect to the unambiguously expressed intent of Congress." *Chevron v. Nat'l Res. Defense Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

system once he determines that the statutory requirements and administrative guidelines are met."). To impose the additional requirement of consultation under section 7 would be inconsistent both with the EPA's statutory obligation to consider only the requirements enumerated in § 1342(b) and with the Clean Water Act's clearly expressed objectives. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "that the States will manage . . . and implement" the NPDES pollution permitting program).

Nor, in my view, does the EPA possess the kind of continuing authority to monitor states' administration of their pollution permitting programs that would render its oversight discretionary. As the majority notes, the EPA's limited oversight under 33 U.S.C. § 1342(c) relates only to the substantive standards of the Clean Water Act and does not grant any additional continuing review authority that would permit meaningful section 7 consultation. The EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary; I would deny the petition for review. 420 F.3d 946, 60 ERC 2025, 35 Envtl. L. Rep. 20,172, 05 Cal. Daily Op. Serv. 7480, 2005 Daily Journal D.A.R. 10,216.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-71439, 03-72894

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT, NATIONAL ASSOCIATION OF HOME BUILDERS; STATE OF ARIZONA; ARIZONA CHAMBER OF COMMERCE, INTERVENORS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ROBERT B. FLOWERS, RESPONDENTS

June 8, 2006

ORDER

Before: STEPHEN REINHARDT, DAVID R. THOMPSON, and MARSHA S. BERZON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc. Fed. R. App. P. 35. The request for panel rehearing and rehearing en banc is DE-

NIED. Judge Kozinski's and Judge Kleinfeld's dissents from denial of en banc rehearing, and Judge Berzon's concurrence in denial of en banc rehearing, are filed concurrently herewith.

KOZINSKI, Circuit Judge, with whom Judges O'SCANNLAIN, KLEINFELD, TALLMAN, CALLAHAN and BEA join, dissenting from denial of rehearing en banc:

Less than two years ago, the Supreme Court unanimously reversed our interpretation of the National Environmental Policy Act (NEPA). *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004). Tone-deaf to the Supreme Court's message, the panel majority in this case interprets the Endangered Species Act (ESA) in precisely the same incorrect way we interpreted' NEPA, dramatically expanding agencies' obligations under the law. Along the way, the majority tramples all over the Fish and Wildlife Service's (FWS) reasonable interpretation of the ESA, deliberately creates a square inter-circuit conflict with the Fifth and D.C. Circuits, and ignores at least six prior opinions of our own court. Finally, the decision is one of considerable importance to the federal government and the states of our circuit. This is precisely the kind of case we should take en banc to set our own house in order.

Background

The Clean Water Act (CWA) instructs that the Environmental Protection Agency (EPA) "shall" transfer pollution permitting authority to a state if the state's proposal meets nine criteria. *See* 33 U.S.C. § 1342(b). None of the criteria involves consideration of endangered species. Arizona applied to take over the CWA permitting process within its borders—the forty-fifth state to

do so. There is no dispute that its proposal met all nine criteria listed in the CWA.

The EPA regional office in San Francisco, however, was worried that the transfer might affect endangered species. *See* 16 U.S.C. § 1536(a)(2) (section 7(a)(2) of the ESA) (requiring federal agencies to "insure" that their actions do not jeopardize endangered species). It thus initiated consultation with FWS pursuant to ESA section 7. The regional office also stated publicly that section 7 required EPA to take endangered species into account when making a transfer decision. FWS's local office in Arizona similarly expressed concerns about the transfer.

Next, the matter was "elevated," meaning the national offices of EPA and FWS took over. After national-level discussions, FWS reversed course, recommending immediate approval of the transfer. That agency issued a Biological Opinion (BiOp) concluding that any impact of the transfer on endangered species would be the unavoidable result of (1) Congress's decision to make ESA section 7 inapplicable to the states, and (2) Congress's decision to *require* transferring the permitting process to the states, provided the nine criteria were met (none of which included consideration of endangered species). Thus, under FWS's interpretation, the ESA was inapplicable: EPA's decision to grant the transfer could not "cause" any impact on endangered species because the decision was non-discretionary. Two days after receiving FWS's recommendation, EPA approved the transfer.

Discussion

In striking down EPA's transfer approval, the majority makes five fundamental blunders: First, it mistakes EPA's internal deliberations for analytical inconsistency. Second, the majority fails to give appropriate deference

to FWS's interpretation of the ESA. Third, the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes. Fourth, the majority contradicts the Supreme Court's recent pronouncement in *Public Citizen*. Finally, the majority dismisses the reasoned opinions of two other circuits, creating a square conflict.

1. The majority first finds that EPA's decision-making process was internally inconsistent. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 959-62 (9th Cir. 2006). On the one hand, EPA stated several times that the ESA required it to consider endangered species before approving the transfer. On the other hand, the agency concluded it had no discretion under the CWA to take endangered species into account when making the transfer decision. Thus, the majority finds, EPA's decision "cannot stand." *Id.* at 962.

The majority makes a big fuss over the supposed internal inconsistency in EPA's reasoning, but the so-called problem is of the panel's own making. The only "inconsistency" is between the San Francisco regional office's interpretation of the ESA and the interpretation by EPA headquarters in Washington, D.C. In other words, EPA changed its mind upon further reflection at a higher level. The agency's position is that adopted by EPA at the national level; the position taken by the agency's regional office was simply overruled by the national office in Washington. There is no inconsistency in the agency's final action, which is the only one we are entitled to review. *See* 5 U.S.C. § 704.

The majority also points out that EPA's final action in this case was inconsistent with the actions it has taken

when other states have applied for a transfer. *See Defenders of Wildlife*, 420 F.3d at 952 n.3 (noting that all of EPA's transfer decisions since 1993—six besides Arizona—have taken endangered species into account, whereas none before 1993 did). But there is no indication that EPA's deliberations in the other cases were ever elevated to the national level. As far as we know, this is the only case in which EPA's Washington, D.C. office has opined on the applicability of the ESA to the transfer of the CWA permitting process. Moreover, an agency is not locked into a particular position forever; it is entitled to change its view over time. *See Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1130 (9th Cir. 1988) (en banc). EPA's actions in other cases are irrelevant to whether its analysis was internally inconsistent in this one.

In any event, the majority's finding of an inconsistency in EPA's analysis, if correct, should have been the end of the case; the majority should have remanded to EPA for further clarification, as the agency asked the panel to do. *See Defenders of Wildlife*, 420 F.3d at 969 n.19. Even the majority itself says it "must remand" to EPA for clarification. See *id.* at 962. Instead, it embarks on a 17-page boondoggle, conducting the very analysis that EPA should have had an opportunity to conduct for itself. *See Gonzales v. Thomas*, _____ U.S._____, _____, 126 S. Ct. 1613, 1614, 164 L. Ed. 2d 358 (2006) ("The Ninth Circuit's failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal.").

2. In faulting EPA for its alleged internal inconsistencies, the majority misconstrues the way the ESA was meant to operate. Under the ESA, a federal agency must

consider whether its action "may affect" endangered species. 50 C.F.R. § 402.14(a). If the agency thinks endangered species *might* be affected, it must ask FWS whether its supposition is correct—whether its action *would*, in fact, affect endangered species—and, if so, what the impact on endangered species will be. *See id.*; *id.* §§ 402.14(e), (h). Then, FWS must respond by issuing a BiOp that the agency must take into account before making its decision. *See id.* §§ 402.14(e), 402.15(a).

In this case, EPA was initially concerned that its approval of Arizona's transfer application might affect endangered species. EPA does not administer the ESA, so it doesn't have the expertise to know for sure. *See Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). In order to find out whether its transfer approval *would*, in fact, affect endangered species, EPA did exactly what it was supposed to do: It asked FWS, the agency that *is* charged with administering the ESA. *See United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998). And FWS did exactly what *it* was supposed to do: It responded with a BiOp informing EPA that its approval would not, in fact, affect endangered species. *See* p. 396 *supra*. With this advice from the congressionally designated experts in hand, EPA decided that its initial concerns were unfounded and that it could go forward with the transfer approval.

The majority finds this perfectly logical sequence of events to be "nonsensical" and impermissible. *See Defenders of Wildlife*, 420 F.3d at 961. According to the majority, once EPA expressed concern that its action might affect endangered species, it had already conclusively determined that its decision was governed by the ESA. *See id.* In other words, under the majority's inter-

pretation, once FWS is consulted for guidance, it is precluded from ever determining that the ESA is inapplicable.

With all due respect to my colleagues, it is *their* conclusion that is nonsensical, undermining the entire consultative process that the ESA establishes and striking down FWS's perfectly reasonable interpretation of the ESA. The majority forgets that FWS is the agency charged with administering the ESA, and that its interpretation of the ESA is thus entitled to *Chevron* deference. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). Here, FWS determined—after careful study at the local and national levels—that the ESA was inapplicable to EPA's decision, and it issued a BiOp relaying its conclusion to the EPA. The majority cannot overturn FWS's statutory interpretation simply because it disagrees with it.

3. Having decided to conduct—on its own—the very analysis that FWS already conducted, the majority comes out the other way, getting it flatly wrong. The majority concludes that section 7 of the ESA required EPA to take endangered species into account when making the transfer decision, notwithstanding the plain contrary language of the CWA. It thus transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute. *See Defenders of Wildlife*, 420 F.3d at 963-67.

Further, the majority handily disposes of a regulation issued by FWS that was supposed to limit ESA's applicability to "actions in which there is *discretionary* Federal

involvement or control." 50 C.F.R. § 402.03 (emphasis added). Unable to reconcile this regulation with its newly expansive interpretation of the ESA's mandate, the majority simply finds that the word "discretionary" in the regulation is meaningless; the regulation, announces the majority, is "coterminous" with the statute it interprets. *See Defenders of Wildlife*, 420 F.3d at 967-69. In other words, despite FWS's regulation, the majority finds that the ESA applies to anything "authorized, funded, or carried out" by a federal agency, 16 U.S.C. § 1536(a)(2), whether discretionary or not. Again, the majority fails to give FWS the deference it is due.[1]

In his dissent, Judge Thompson succinctly identifies the serious flaws in the majority's analysis. He points out that EPA had no authority under the CWA to consider endangered species when making the transfer decision. And he explains that the majority's interpretation of the scope of ESA's applicability contradicts our precedents: "[W]e have consistently recognized that an agency may have decisionmaking authority and yet not be empowered . . . to act to protect endangered species." *Defenders of Wildlife*, 420 F.3d at 979-80 (Thompson, J., dissenting) (citing six Ninth Circuit precedents that contradict the majority's holding). Once the nine criteria were met, the dissent concludes, the CWA mandated the transfer; nothing in ESA section 7 allows—let

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[1] The majority points out that "§ 402.03 is a regulation, *not* a statute," *Defenders of Wildlife*, 420 F.3d at 969 n.19, as if that somehow robs its interpretation of deference. But FWS issued the regulation in question. *See id.* at 951 n.1. Its interpretation of the regulation is therefore also entitled to "substantial deference." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (internal quotation marks omitted).

alone requires—the EPA to ignore the clear language of the CWA. *See id.* at 980-81.[2]

4. The majority's superfluous holding—that ESA forces an agency to consider the impact of its decisions on endangered species, even when the agency's governing statute precludes it from doing so—also flies in the face of *Public Citizen*, where the Supreme Court unanimously reversed our interpretation of NEPA. *See* 541 U.S. at 770, 773, 124 S. Ct. 2204.

The issue in *Public Citizen* was whether NEPA "require[s] the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers" before deciding whether to grant registration to Mexican trucks. *Id.* at 756, 124 S. Ct. 2204. NEPA's language, regarding when and how an agency must take into account the impact of its actions on the environment, is similar to ESA's language regarding endangered species. *Compare* 42 U.S.C. § 4332(2)(C) *and* 40 C.F.R. § 1508.18, *with* 16 U.S.C. § 1536(a)(2) *and* 50 C.F.R. § 402.03. And the FMCSA's governing statute, like the CWA, instructs that the agency "shall" grant registration to any carrier meeting certain criteria, none of which involves environmental concerns. *See* 49 U.S.C. § 13902(a)(1).

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[2] We cannot presume that Congress repealed the CWA's categorical mandate sub silentio, simply by passing the ESA. *See* n.4 *infra*. But even if we were inclined to believe, as the panel majority does, that the CWA and ESA need to be reconciled, FWS's regulation is a perfectly plausible way to do so: By limiting the ESA's applicability to "discretionary" agency actions, 50 C.F.R. § 402.03, the regulation avoids the supposed conflict the majority has created between the ESA and governing statutes—like the CWA—that mandate agency action.

In upholding the agency's decision to grant registration without taking into account the environmental impact of Mexican trucks, the Supreme Court stressed that "FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable . . . requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety." *Id.* at 758-59, 124 S. Ct. 2204 (internal quotation marks and citation omitted). The Supreme Court concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.[3] Hence, under NEPA . . . the agency need not consider these effects. . . . [B]ecause FMCSA has no discretion to prevent the entry of Mexican trucks, [it] did not need to consider the environmental effects arising from the entry." *Public Citizen*, 541 U.S. at 770, 124 S. Ct. 2204.

The Supreme Court's holding in *Public Citizen* applies equally to this case: Because EPA had no discretion under the CWA to prevent the transfer of permitting authority to Arizona, it did not need to consider the transfer's effects on endangered species. The majority's con-

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[3] The majority quotes this sentence verbatim from *Public Citizen. Defenders of Wildlife*, 420 F.3d at 963. But, instead of recognizing that this language controls the case, the majority uses it as a springboard to launch into its unnecessary analysis.

trary conclusion cannot be reconciled with the Supreme Court's unanimous decision.[4]

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[4] Judge Berzon's concurrence dismisses *Public Citizen* as "entirely uninformative," concurrence at 406, by labeling NEPA as a "strictly procedural statute" and the ESA as a "partially substantive statute," *id.* What Judge Berzon must be arguing is that the ESA effected a sub silentio repeal of EPA's categorical obligation under the CWA, so that the statutory "shall" was foreshortened to "may." There is absolutely no indication that Congress meant to do any such thing and we should long hesitate before concluding that it did this unknowingly. *See Watt v. Alaska*, 451 U.S. 259, 267, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981) (noting the maxim of statutory interpretation that "repeals by implication are not favored," and stating that "[t]he intention of the legislature to repeal must be clear and manifest" (internal quotation marks omitted)); *id.* at 280, 101 S. Ct. 1673 (Stewart, J., dissenting) ("The maxim that 'repeals by implication are disfavored' has force when the argument is made that a general statute . . . eviscerates an earlier and more specific enactment of limited coverage but without an indication of congressional intent to do so."); *see also Ex parte Yerger*, 8 Wall. 85, 105, 19 L. Ed. 332 (1869) ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act.").

If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency. We should be particularly chary of holding that the ESA made such sweeping changes when the agency charged with implementing the statute has adopted a regulation allowing the ESA to coexist peacefully with all categorical mandates. *See* 50 C.F.R. § 402.03; n.2 *supra*. There is no justification for nullifying countless congressional directives by casting aside the agency's authoritative interpretation of the ESA, formally adopted pursuant to notice and comment procedures.

Unless one buys into the dubious proposition that Congress somehow repealed the term "shall" in 33 U.S.C. § 1342(b), this case is a carbon copy of *Public Citizen*. "Shall" means shall here as it did there; thus EPA has no discretion to deny the transfer once the nine statutory criteria are satisfied. *See* Kleinfeld dissent at 401-02. Just as in *Public Citizen*, the agency's action—granting the transfer—is not a legally

5. Finally, the majority opinion squarely, and admittedly, conflicts with the Fifth and D.C. Circuits. *See Defenders of Wildlife*, 420 F.3d at 970. In *American Forest & Paper Ass'n v. EPA*, the Fifth Circuit considered precisely the same question at issue in this case: whether the ESA imposes its own criteria on EPA's decision to transfer CWA permitting authority to a state—in that case, Louisiana—or whether the nine factors enumerated in the CWA are, as the plain text of the statute requires, an exhaustive list that precludes consideration of endangered species. *See* 137 F.3d 291, 297-99 (5th Cir. 1998).

In *American Forest*, unlike in this case, the EPA *wanted* to condition the transfer of the permitting process on protection of endangered species. But the Fifth Circuit determined—in direct contradiction to the majority here—that "[t]he [CWA's] plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command 'shall approve,' [the CWA] cannot be construed to allow EPA to expand the list of permitting requirements" to include consideration of endangered species. *Id.* at 298. Further, when EPA argued that the ESA compelled it to consider endangered species, the Fifth Circuit inter-

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relevant "cause" of any impact on endangered species because the agency had no discretion in the matter once the statutory criteria were met. *See* 541 U.S. at 769, 124 S. Ct. 2204.

When we are confronted with a question of statutory interpretation, we must take into account the Supreme Court's previous interpretation of highly similar words in an analogous situation, even if the two cases are not "identical." Concurrence at 404. It is no doubt symptomatic of my "myopic" view of the world, *id.* at 406, but I believe we should treat Supreme Court pronouncements as binding, not as mere hazards to navigation.

preted section 7(a)(2) of the ESA to mean exactly the opposite of the majority's holding:

> [I]f EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA . . . confers no substantive powers. . . . [T]he ESA serves not as a font of new authority, but as something Far more modest: a directive to agencies to channel their *existing* authority in a particular direction. *The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA.*

Id. at 298-99 (second emphasis added) (footnote omitted). In recognition of the circuit split it is creating, the majority dismisses the Fifth Circuit's reasoning out of hand, calling it a "fundamental misconception" and "simply incorrect." *Defenders of Wildlife*, 420 F.3d at 971.

The D.C. Circuit has also considered the ESA's power to override the mandate of an agency's governing statute. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 32-33 (D.C. Cir. 1992). Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) was precluded from amending the annual licenses it gave to a hydroelectric plant, and thus could not insert wildlife protective conditions into the license upon renewal. *See id.* at 32. Petitioners alleged, however, that notwithstanding the Federal Power Act, section 7 of the ESA required FERC to impose such conditions on the licensee. *See id.* at 33. The D.C. Circuit disagreed:

> The Trust reads section 7 essentially to oblige the Commission to do "whatever it takes" to protect the

> threatened and endangered species that inhabit the Platte River basin; any limitations on FERC's authority contained in the [Federal Power Act] are implicitly superseded by this general command. . . . We think the Trust's interpretation of the ESA is farfetched. As the Commission explained, the statute directs agencies to "utilize their authorities" to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.

Id. at 34. Like the Fifth Circuit, the D.C. Circuit's interpretation of the ESA directly contradicts the majority's holding in this case. But again, the majority dismisses its sister circuit's reasoning as "cursory" and unpersuasive. *Defenders of Wildlife*, 420 F.3d at 971.[5]

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[5] The majority concedes the conflict with the Fifth and D.C. Circuits but claims it is merely taking sides in a preexisting conflict, because the First and Eighth Circuits have issued opinions agreeing with its position. *See id.* at 970-71 (citing *Conservation Law Found. v. Andrus*, 623 F.2d 712 (1st Cir. 1979), and *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989)). The First and Eighth Circuit cases, however, do not support the majority's position. Both cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does. *See Andrus*, 623 F.2d at 715 ("[T]he assumption that the ESA and OCSLA are mutually exclusive . . . is incorrect—the standards of these two acts are complementary, and the ESA will continue to apply of its own force. . . ."); *Defenders of Wildlife*, 882 F.2d at 1299 ("FIFRA does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides."). Neither circuit held, as the majority in this case does, that the ESA trumps the governing statute, or that the ESA applies when the governing statute precludes agency discretion regarding endangered species. The inter-circuit conflict is entirely of the panel's own making.

* * *

The majority's opinion has far-reaching effects on the scope of the Endangered Species Act. Its holding—that the ESA imposes an affirmative duty on a federal agency to protect endangered species, even in the face of a governing statute that explicitly precludes the agency from doing so—contradicts FWS's statutory interpretation, ignores the very recent instructions of the Supreme Court, and creates a conflict with two other circuits. And for what? All EPA asks for is to have an opportunity to clarify its position on the issue, and explain why its decision to transfer permitting authority to Arizona made sense. Even more recent Supreme Court instructions emphatically command us to do just that. *See Thomas*, 126 S. Ct. at 1614-15. The majority's stubborn refusal to give the agency that opportunity before vacating its transfer decision has put us in a highly precarious position vis-à-vis the executive branch, the states, the other circuits and the Supreme Court. We should have taken the case en banc and fixed the problems ourselves.

KLEINFELD, Circuit Judge, dissenting from denial of rehearing en banc:

I join in Judge Kozinski's thorough dissent, but write separately to show just how simple this case should have been. As Judge Thompson pointed out in his dissent from the panel's decision, the statute is mandatory. Congress commands that the agency "shall approve" state programs "unless" one or more of nine conditions are not met. The "shall/unless" formula makes the nine condition list exclusive, and courts cannot add conditions to the list.[1] The language has the look of a careful legisla-

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[1] *See, e.g., Department of Transp. v. Public Citizen*, 541 U.S. 752, 767, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2005).

tive compromise necessary to get the votes for passage.[2] The statute leaves no room for conditions ten, eleven, or whatever else we may think Congress should have added.[3]

BERZON, Circuit Judge, concurring in the order denying the petition for rehearing en banc:

I.

I begin by explaining why I am writing this concurrence: A practice has developed in this court of writing dissents from denial of rehearing en banc consideration as a matter of routine. Those dissents sometimes read more like petitions for writ of certiorari than judicial opinions of any stripe. They pose a dilemma for those who believe the original opinion correct, as they may raise issues not addressed by that opinion because not articulated by the parties before the petition for rehearing stage—or ever.

The result, absent some response, is a distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court either perceived no error or thought the case not one of much consequence. At the

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[2] *Cf. Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) ("Legislation often results from a delicate compromise among competing interests and concerns. If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the qualifying words in the statute, then we would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed.").

[3] Cf. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992).

same time, answering the newly raised contentions by amending the panel opinion is usually not feasible. The court has voted not to rehear en banc the original opinion and ought not to have to accept a new version without a second opportunity to determine whether the opinion deserves en banc consideration. The result, quite obviously, could be a form of infinite regression which precludes us from ever finally deciding the case.

In this case, Judge Kozinski writes an impassioned dissent from denial of en banc consideration, accusing the panel majority of all manner of judicial perfidy. The problem is that his accusations are either flat wrong or indicate a misunderstanding of the holdings in the panel opinion. As the author of the panel opinion, I have no choice but to try to set the record straight. So as to avoid establishing a new tradition of group *concurrences* in denial of en banc to match the group dissents, I intentionally write for myself alone, without the concurrence of any of my colleagues.

II.

The majority opinion in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), if carefully read, contains responses to most of the baseless attacks that Judge Kozinski has dropped upon it. Among other errors in the dissent from denial of rehearing en banc that are exposed in the opinion are:

(1) the notion that the national Environmental Protection Agency (EPA) did not endorse in this case the position that the Endangered Species Act requires consultation with regard to Clean Water Act permit-

ting decisions, Kozinski Dissent at 6290-91, when it did, *see Defenders of Wildlife*, 420 F.3d at 959-60;[1]

(2) the repeated assertion that section 401 of the Clean Water Act "precludes" application of the plain language of section 7 of the after-enacted Endangered Species Act, Kozinski Dissent at 6294, when the pertinent part of the Clean Water Act does not mention the Endangered Species Act at all, *see Defenders of Wildlife*, 420 F.3d at 963-69;

(3) the insistence that the Endangered Species Act does not apply to *any* action "authorized, funded, or

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[1] Judge Kozinski insists that "[a]ll EPA asks for is to have an opportunity to clarify its position on the issue, and explain why its decision to transfer permitting authority to Arizona made sense." Kozinski Dissent at 401; *see also id.* at 396. In fact, in its petition for rehearing en banc the EPA quarreled at length with the merits of the majority opinion, and, building upon Judge Thompson's dissent, asserted an intracircuit conflict. The possibility of a remand for clarification of the agency's interpretation of the statute is mentioned in a single footnote and only with regard to the portion of the opinion that discusses EPA's prior inconsistent positions (an inconsistency which, unlike Judge Kozinski, the EPA does not dispute).

Furthermore, Judge Kozinski's citation to *Gonzales v. Thomas*, ____ U.S. ____, 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006) is inapposite. In *Thomas*, the Supreme Court faulted this court for not giving the agency an opportunity to decide an issue in the first instance. Here, in contrast, the EPA did decide that a transfer was appropriate and that it did not have the authority to consider the impact on endangered and threatened species of the transfer decision. We disagreed with both conclusions. Now, the EPA wants to decide the issue *again*, explaining its reasoning once more. *INS v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002), does not require that an agency have *two* chances to consider a factual or legal question before appellate review, only one. Further, the majority opinion ultimately *does* remand the transfer decision for consideration on proper legal grounds.

carried out" by a federal agency, Kozinski Dissent at 6293, when that is exactly what section 7(a)(2) says, in a perfectly clear statutory requirement that may not be contravened by an interpretative regulation, *see Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 & n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *Defenders of Wildlife*, 420 F.3d at 969;

(4) the allegation that there was not a preexisting circuit split, even though *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), and *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979), held that agencies *do* have to comply with the Endangered Species Act *as well as* their own governing statutes, *see Defenders of Wildlife*, 420 F.3d at 970;

(5) the contention that the analysis contained in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27, 34 (D.C. Cir. 1992), and *American Forest & Paper Ass'n v. U.S. Environmental Protection Agency*, 137 F.3d 291, 293-94 (5th Cir. 1998), is more accurate than the analysis in *Defenders of Wildlife*, even though those cases rely on the language of section 7(a)(1) and disregard the quite different wording of section 7(a)(2), *see Defenders of Wildlife*, 420 F.3d at 970-71;

(6) the statement that *American Forest* decided precisely the same question addressed in *Defenders of Wildlife*, Kozinski Dissent at 400, when the issue in that case was not what factors the EPA must consider in making the transfer decision but whether the EPA

must impose Endangered Species Act requirements on the states as a condition of transfer;

(7) the accusation that the panel opinion "ignor[ed] at least six prior opinions of our own court," Kozinski Dissent at 395, when the panel opinion discusses and distinguishes those opinions at some length, *Defenders of Wildlife*, 420 F.3d at 967-69; and

(8) the assertion that the Fish and Wildlife Service's (FWS) position regarding the impact of the transfer is entitled to *Chevron* deference, Kozinski Dissent at 398, even though that position required, in part, an interpretation of the Clean Water Act, over which the FWS has no regulatory power, 33 U.S.C. 1251(d) (designating the Administrator of the EPA to "administer this chapter").[2]

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[2] Judge Kozinski also insists that the majority opinion "presume[s] that Congress repealed the CWA's categorical mandate sub silentio, simply by passing the ESA." Kozinski Dissent at 398 n.2. As the opinion makes clear, we do not see the Endangered Species Act as *repealing* any part of the Clean Water Act. Rather, the Endangered Species Act, a later-enacted statute, *adds* one requirement to the list of considerations under the Clean Water Act permitting transfer provision. The repeal accusation places entirely too much weight on the word "shall," supposing that it shuts out any and all additional federal requirements concerning federal decision-making.

Moreover, if the precept disfavoring repeals by implication does apply, the very definite, unqualified language of the after-enacted Endangered Species Act must still prevail. *See United Ass'n of Journeymen v. Reno*, 73 F.3d 1134, 1140 (D.C. Cir. 1996) (finding that a specific, detailed provision precludes operation of an earlier-enacted general statute that would otherwise apply); *id.* at 1142 (Edwards, J., dissenting) (noting that the specific provision did not mention the other provision or statute at issue in the case); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978) (noting that Congress expressly limited the Endangered Species Act's "broad

There is, however, one point upon which Judge Kozinski places much stock—perhaps more than on any other—that is not addressed in the majority panel opinion. The reason for the lapse is not that Judge Kozinski is correct in his emphatic assertions regarding *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004), but that he is so wrong that there was no reason we would have addressed his argument in the first instance.

III.

Judge Kozinski boldly asserts that the panel opinion "flies in the face of *Public Citizen*". The assertion that the two cases are identical, even similar, misunderstands both *Public Citizen* and *Defenders of Wildlife* itself, while ignoring a Supreme Court case that *is* closely on point, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

The Endangered Species Act, at issue in *Defenders of Wildlife*, sets a substantive requirement that all agencies must follow. As *Tennessee Valley Authority* states, the Endangered Species Act "*affirmatively command[s]* all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species." *Defenders of Wildlife*, 420 F.3d at 964 (quoting *Tenn. Valley Auth.*, 437 U.S. at 173, 98 S. Ct. 2279). *Public Citizen* concerned an entirely different environmental statute, the National Environmental Policy Act (NEPA). NEPA, in contrast to the Endangered Species Act, establishes

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sweep" in certain, enumerated situations, and because of such express limitations "we must presume that these were the only 'hardship cases' Congress intended to exempt").

only the requirement that environmental impact must be *considered* when making certain federal decisions. *See* 42 U.S.C. § 4332(2)(C) (requiring a statement of environmental impact for "major Federal actions" but requiring no federal response to any environmental impact demonstrated); *Public Citizen*, 541 U.S. at 756-57, 124 S. Ct. 2204 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989)).

Public Citizen concerned a congressionally enacted moratorium prohibiting certain motor carriers from obtaining operating authority within the United States and authorizing the President to lift the moratorium. *Id.* at 759, 124 S. Ct. 2204. In 2002, the President lifted the moratorium with respect to Mexican motor carriers. *Id.* at 762, 124 S. Ct. 2204. The Federal Motor Carrier Safety Administration, the agency with authority to grant registration to foreign motor carriers, issued rules for monitoring Mexican motor carriers. *Id.* Petitioners sued, claiming that the rules were promulgated in violation of NEPA and the Clean Air Act. *Id.*

The Supreme Court rejected petitioners' arguments. Pertinent here is the Court's discussion of NEPA, as that is the portion of *Public Citizen* with which Judge Kozinski claims *Defenders of Wildlife* is in conflict.[3] Critically for present purposes, NEPA is a procedural stat-

[3] It is worth noting also that, as *Public Citizen* recognized, NEPA requires an agency to provide an Environmental Impact Statement only "if it will be undertaking a '*major* Federal actio[n],' which 'significantly affect[s] the quality of the human environment.'" *Id.* at 763, 124 S. Ct. 2204 (quoting 42 U.S.C. § 4332(2)(C)) (emphasis added). There is no requirement of a "*major* Federal actio[n]" in the Endangered Species Act; any "action authorized, funded, or carried out by the agency" will do. 16 U.S.C. § 1536(a)(2).

ute *only*, *see id.* at 756, 124 S. Ct. 2204; it provides specific steps that must be taken before making decisions with regard to major actions that the agency has authority to undertake, but does not direct that environmental considerations actually influence the action.[4] In contrast, the Endangered Species Act provides that in taking *any* action authorized, funded, or carried out by the agency, *any* agency must meet a substantive requirement—it must not threaten listed species. *See Hill*, 437 U.S. at 188 n.34, 98 S. Ct. 2279 (distinguishing NEPA, as a procedural statute, from the Endangered Species Act, as a substantive statute).

Public Citizen considered whether the Department of Transportation (DOT) was required to "take into account the environmental effects of increased cross-border operations of Mexican motor carriers." *Id.* at 765, 124 S. Ct. 2204. The Supreme Court held that the agency was not required to do so, because it "has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican carriers from

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[4] 42 U.S.C. 4332(2)(C) reads:

> [A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

operating within the United States." *Id.* at 766, 124 S. Ct. 2204. In other words, NEPA's purposes would not be served by requiring the agency to engage in NEPA's procedural steps with regard to a decision it could not make. *Id.* at 769, 124 S. Ct. 2204. Because the DOT in *Public Citizen* had no authority to determine whether to allow in the Mexican trucks, it had no occasion under NEPA to consider environmental factors in making such a decision.

Here, the central question concerns whether EPA has a substantive responsibility and authority, created by the Endangered Species Act itself, to refrain from taking action that threatens listed species. If it does, then there is nothing futile about considering whether endangered species will be affected, for that is the inquiry the statute dictates.

The difference between NEPA, a strictly procedural statute, and the Endangered Species Act, a partially substantive statute, is critical. *Public Citizen* determined because there was *no* statutory authority for the Department of Transportation to ban the Mexican trucks for environmental reasons, there were therefore no procedures mandated by NEPA to inform the phantom decision. Only the most myopic observer could fail to see the difference between a statute that simply provides a procedure to inform decisionmaking processes governed entirely by other statutes from one that sets a *substantive* decisionmaking requirement.

The central dispute in this case concerns the reach of the substantive mandate of section 7 of the Endangered Species Act. The question in this case is one specific to the Endangered Species Act and depends only on the particular language, history, and administrative applica-

tion of that statute. As to that question, *Public Citizen*, a case that has nothing to do with the Endangered Species Act here at issue and that construed a statute with *no* substantive import, emphatically does *not* "appl[y] equally to this case." Kozinski Dissent at 399. Instead, *Public Citizen* is entirely uninformative on the key legal point in this case.

APPENDIX C

[Seal Omitted]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

[Dated: Oct. 13, 2006]

Honorable H. Dale Hall
Director
U.S. Fish and Wildlife Service
1849 C St., N.W.
Washington, DC 20240

Re: Applicability of ESA Requirements to EPA Clean Water Act NPDES State Program Approvals

Dear Director Hall:

Recently, Alaska submitted an application to EPA to administer the National Pollutant Discharge Elimination System (NPDES) program in that State, pursuant to Section 402(b) of the Clean Water Act (CWA), 33 U.S.C. 1342(b).[1] In light of the need to process Alaska's application, we believe that it is appropriate to attempt to clarify both EPA's position and the position of the Services re-

[1] On July 5, 2006 the Administrator received the State of Alaska's NPDES Authorization Application. On August 1, 2006 EPA notified the governor of the State of Alaska via letter that the State's application was incomplete. EPA is working with the State to resolve outstanding issues, and the Agency anticipates that the State will submit a revised application in the near future.

garding application of Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), to actions under CWA Section 402(b). So that we may properly carry out our obligations in connection with this application, we seek confirmation from your office that the analysis set forth in this letter is consistent with your interpretation of the ESA and its implementing regulations.

In *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), *rehearing denied*, 450 F.3d 394 (9th Cir. 2006) ("*Defenders*"), EPA and the U.S. Fish and Wildlife Service articulated the position that EPA does not have a duty to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service under the Endangered Species Act ("ESA") when EPA takes action on a State's application to administer the National Pollutant Discharge Elimination System ("NPDES") Program under Section 402 of the Clean Water Act ("CWA").[2] Intervenors, National Association of Home Builders, et al., filed a petition for writ of certiorari from that decision on September 6, 2006. The deadline for the federal government to file a petition for certiorari has been extended until October 23, 2006. In the meantime, the

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[2] As you know, EPA has consulted with the Services on NPDES program approvals as a matter of practice, but has not adopted a formal national position on whether or not it had a duty to do so since EPA's approval of Louisiana's NPDES program was vacated in part in 1998. See *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 294-98 (5th Cir. 1998) ("*AFPA*") (court of appeals disagrees that the ESA justifies or grants EPA authority to condition NPDES program approval on considerations outside CWA Section 402(b)); 66 Fed. Reg. 11202, 11205 (Feb. 22, 2001) (Memorandum of Agreement between EPA and the Services notes that "EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species").

court of appeals has granted a stay of the mandate pending review in the Supreme Court. *Defenders*, No. 03-71439, Order (9th Cir. June 16, 2006).

In *Defenders*, the court of appeals found that the record reflected "contradictory" positions regarding the application of ESA Section 7(a)(2) to Arizona's application to administer the NPDES program, and noted that review in that case had been hampered by the lack of a coherent agency interpretation of how the ESA applies in these circumstances. 420 F.3d at 961-62. The court of appeals also found that the ESA confers upon federal agencies authority to protect endangered species that goes beyond that conferred by the agencies' own governing statutes. *Id.* at 964. This decision is at odds with *AFPA*, 137 F.3d at 298 (ESA does not grant EPA authority to expand the criteria in CWA Section 402(b) in evaluating a State NPDES program application), and *Platte River Whooping Crane Trust v. F.E.R.C.*, 962 F.2d 27, 34 (D.C. Cir. 1992) ("[the ESA] does not *expand* the powers conferred on an agency by its enabling act") (emphasis in original), thus creating a split among the circuits on this issue. We are hopeful that obtaining your views on these issues in advance of processing Alaska's application may avoid a repetition of that problem here.

The court of appeals in *Defenders* went on to find that EPA approvals of State applications under CWA Section 402(b) are subject to the obligations contained in ESA Section 7(a)(2); that ruling is the subject of the pending request for Supreme Court review. We believe that it is important in the meantime for EPA and the Services to enunciate a single, coherent interpretation of the ESA as it applies to NPDES program approvals under CWA Section 402(b). For the reasons that follow, EPA concludes

that a proper interpretation of the two statutes leads to the conclusion that Section 7(a)(2) does not apply to approvals of State NPDES programs pursuant to CWA Section 402(b), and EPA seeks concurrence that you share this view.

EPA's position that the no-jeopardy and consultation duties of ESA Section 7(a)(2) do not apply to approval of a State's application to administer the NPDES program is grounded upon three principles. First, because the CWA commands the Agency to approve State applications when clearly defined criteria are met, EPA lacks the discretion to disapprove such an application where these criteria are satisfied. Second, the ESA does not expand EPA's authority to address the concerns of listed species where Congress has limited the Agency's ability to consider such concerns in a given context. Third, the Services' regulations confirm that ESA Section 7 duties do not apply where an agency lacks "discretionary involvement or control" over its action sufficient to benefit listed species or designated critical habitat.

1. The CWA Limits EPA's Discretion to Considering the Criteria in Section 402(b) When Reviewing a State's Application to Administer the NPDES Program.

Congress has provided that a State may issue NPDES permits for discharges to waters within its jurisdiction after EPA approves the State's proposed NPDES program. 33 U.S.C. § 1342(b);[3] *District of Columbia v. Schramm*, 631 F.2d at 860. The courts have consistently held that EPA *must* approve State programs that meet federal CWA requirements. *AFPA*, 137 F.3d at 297

[3] A copy of CWA § 402(b) is enclosed as Appendix A.

(CWA Section 402(b) "provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements"); *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 173-174 (D.C. Cir. 1988) (The CWA "commands the Administrator to approve the state permit system once he determines that the statutory requirements and administrative guidelines are met.") (*citing Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979)).[4]

In *AFPA*, the Fifth Circuit found that EPA had impermissibly sought to condition the transfer of NPDES permitting authority to the State of Louisiana on procedures protecting listed species. 137 F.3d at 298. The court found that EPA attempted to require the State to consult with FWS and NMFS regarding the effect of State-issued permits on listed species, and had reserved the power to veto such permits if FWS or NMFS objected to particular permits. *Id.* at 294. The Fifth Circuit found that, "[t]he language of § 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements." 137 F.3d at 297. None of the nine criteria contemplate or provide for consideration of potential effects to listed species of critical habitat. Because the State

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[4] See, also, *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978) (The result is "a system for the mandatory approval of a conforming State program [which] creates a separate and independent State authority to administer the NPDES pollution controls.") (*quoting Mianus River Pres. Comm. v. EPA*, 541 F.2d 899, 905 (2d Cir. 1976)); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 and n.3 (5th Cir. 1977) ("The Amendments [to the CWA] set out the full list of requirements a state program must meet * * *. Unless the Administrator of EPA determines that the proposed state program does not meet these requirements, he must approve the proposal.").

met the nine requirements, approval was not discretionary, and EPA could not condition approval on meeting endangered species concerns.[5] In short, because the CWA commands EPA to approve State NPDES program applications that satisfy the criteria set forth in CWA Section 402(b), EPA has no choice but to approve such applications.[6]

2. The ESA Does Not Expand Statutory Limits on EPA's Authority.

EPA's understanding is that the ESA itself does not create any new substantive authority for an agency—EPA in this case—to prevent it from acting in accordance with other statutory mandates or to implement or impose conditions for the protection of listed species where Congress has limited such authority under the statutes the agency administers. In the *AFPA* case, the Fifth Circuit explained that "if EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so." 137 F.3d at 298. The court concluded that nothing in the language of Section 7 indicated that Congress intended to expand an agency's authority beyond what it possessed under other statutes.

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[5] The court understood EPA's position to be that the CWA "authoriz[ed] the agency to regard the nine requirements § 402(b) as minimum, not exhaustive, criteria." 137 F.3d at 297. To the extent that this represented the agency's position at the time of the *AFPA* litigation, we agree with the Fifth Circuit that such a position cannot be reconciled with the plain language of the statute.

[6] EPA's conclusion that approval of State NPDES Program applications is required where the minimum statutory criteria are met is consistent with Congressional intent underlying CWA Section 402(b). See, *Shell Oil Co. v. Train*, 585 F.2d at 410 ("Congress clearly intended that the states would eventually assume the major role in the operation of the NPDES program.").

Id., see also Platte River Whooping Crane Trust v. F.E.R.C., 962 F.2d at 34 (D.C. Cir. 1992) ("[the ESA] does not *expand* the powers conferred on an agency by its enabling act") (emphasis in original). The *AFPA* case is especially relevant here, since the Fifth Circuit ruled that EPA could not rely on the ESA to expand the factors considered in its decision to authorize Louisiana to administer the NPDES program.

3. Under the Services' Regulations, EPA is not Required to Consult on State NPDES Program Approvals

The Services' ESA regulations also support EPA's conclusion that consultation is not necessary when the Agency approves a State's NPDES program application. "Effects of the action," as defined at 50 C.F.R. § 402.02, are "the direct and indirect effects of an action on the species or critical habitat." Because EPA's approval of a State's application results merely in the administrative transfer of authority over the NPDES program, there are no direct effects to species or habitat. "Indirect effect," according to the Services' regulations, "are those that are *caused* by the proposed action and are later in time, but still are reasonably certain to occur." *Id.* (emphasis added). The FWS's biological opinion regarding EPA's approval of Arizona's application to administer the NPDES program, dated December 3, 2002, made clear that no loss of conservation benefit is "caused" by EPA's decision to approve the State's program. Rather, any impacts to species that might follow transfer of authority over the NPDES program from EPA to a State are attributable to Congress' decision to grant States the right to administer the programs under state law provided the State's program meets the minimum requirements of

402(b) of the Clean Water Act. Because EPA's action is not the "cause" of any effects on species or habitat, the Agency's action has no indirect effects under the Services' regulations.

This conclusion is supported by a recent Supreme Court decision. The Supreme Court made clear in a case involving the National Environmental Policy Act that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004). Here, EPA's lack of discretion to deny NPDES transfer applications where the criteria in CWA Section 402(b) are satisfied argues strongly against a conclusion that the approval of such an application can be viewed as the cause of adverse effects on listed species flowing from state-granted permits.

The Services' regulations further specify that the consultation requirements in Section 7 of the ESA apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Until the *Defenders* decision, the Circuit Courts of Appeal had consistently held that the consultation duties outlined in ESA Section 7(a)(2) did not apply to federal agencies unless they possessed discretion under their existing authorities to take actions that might inure to the benefit of listed species.[7] The court in *Defenders*, however, found that the

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[7] *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (Bureau of Land Management approval of road construction was not a "discretionary" action triggering consultation responsibilities where the federal agency lacks "the ability to implement measures that inure to the benefit of the protected species."). See, also, *Ground Zero Center for*

language in Section 402.03 describing "discretionary" agency action "to be coterminous with the statutory phrase limiting Section 7(a)(2)'s application to those cases, 'authorized, funded or carried out' by a federal agency." *Defenders*, 420 F.3d at 969.

EPA seeks confirmation of your view that the court's interpretation of Section 402.03 in *Defenders* is incorrect. Specifically, we are seeking confirmation that without "discretionary involvement or control" that might inure to the benefit of species, EPA's decision to approve a State's NPDES program is not an action subject to the requirements of ESA Section 7. As discussed in section

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Nonviolent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1092 (9th Cir. 2004) (The Navy need not consult on the operation of a new missile program where there is no agency discretion to act because consultation "would be an exercise in futility."); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("Where there is no agency discretion to act, the ESA does not apply."); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (FWS advisory letter did not constitute a "federal action" triggering a duty to consult under ESA Section 7 because "there was no discretionary federal involvement or control over the Lumber Companies' proposed salvage operations."); *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F. 1073, 1083 (9th Cir. 2001) (FWS was not required to reinitiate consultation under ESA Section 7(a)(2) because it had not retained discretionary control over an earlier-issued incidental take permit sufficient to require the recipient of that permit to take steps that would inure to the benefit of listed species); *In re: Operation of the Missouri River System Litigation*, 421 F.3d 618, 630 (8th Cir. 2005) (Stating, in *dicta*, that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority."); *Strahan v. Linnon*, 187 F.3d 623, 1998 WL 1085817 at *3 (1st Cir. 1998) (ESA Section 7 does not apply to Coast Guard actions compelled by another statute.).

1 of this letter, EPA lacks the discretion to do anything but approve a State's application to administer the NPDES program once the Agency concludes that the criteria enumerated in CWA Section 402(b) are satisfied. Because EPA must approve State programs that meet the statutory criteria in CWA Section 402(b), and because none of these criteria give the Agency discretion to consider protection of listed species or designated critical habitat in deciding whether to approve an NPDES program, the Agency's approval decision is not "discretionary" under the Services' regulations.

For the above reasons, EPA believes that the provisions of Section 7(a)(2) regarding consultation with the Services, do not apply when the Agency considers whether to approve or disapprove a State's application to administer the NPDES program. I request confirmation from you by October 20, 2006, that you agree with the interpretations of the ESA and the Services' regulations in this letter. I appreciate your attention to this matter and look forward to discussing this issue with you to facilitate EPA's consideration of the renewed application we expect to receive from Alaska, and of other State applications we may receive in the future.

Sincerely,

/s/ BENJAMIN H. GRUMBLES
BENJAMIN H. GRUMBLES
Assistant Administrator

Enclosure

APPENDIX D

[Seal Omitted]

United States Department of the Interior

FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20460

[Dated: Oct. 17, 2006]

Honorable Benjamin H. Grumbles
Assistant Administrator
United States Environmental Protection Agency
Washington, D.C. 20460

Re: Applicability of Endangered Species Act Requirements to the Environmental Protection Agency's Clean Water Act National Pollutant Discharge Elimination System State Program Approvals

Dear Mr. Grumbles:

This letter responds to your letter regarding Alaska's application to the Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES) program in that State, pursuant to section 402(b) of the Clean Water Act (CWA), 33 U.S.C. 1342(b). As you note, EPA has no discretion to disapprove such an application based upon criteria (such as protection of listed species) not listed in CWA Section 402(b) itself. Moreover, you state your interpretation that ESA Section 7 does not expand EPA's authority to address the protection of listed species

where Congress has limited the Agency's ability to consider such concerns. You further note that the joint Interior Department/Commerce Department regulations interpret ESA Section 7 duties not to apply when an agency lacks "discretionary involvement or control" over its action sufficient to benefit listed species or designated critical habitat. Accordingly, you conclude that CWA Section 402(b)'s mandate to approve State applications precludes the jeopardy avoidance and consultation duties of ESA Section 7(a)(2). You asked for confirmation that the U. S. Fish and Wildlife Service (Service) agrees with your analysis with regard to ESA Section 7 and its implementing regulations. As discussed below, and consistent with your conclusion on the lack of discretion under the statute in rendering EPA's approval, and with the advice of the Solicitor, we concur with these conclusions.

This letter will also serve to clarify the agencies' position in light of the decision in *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946, 963 (9th Cir. 2005), *rehearing en banc denied*, 450 F.3d 394 (9th Cir. 2006). The court of appeals in that case perceived an inconsistency in the agencies' position regarding consultation and the no jeopardy determination, and it misunderstood the meaning and import of one of the joint regulations under the ESA, 50 C.F.R. 402.03.

We acknowledge that the Service has previously consulted with EPA on the transfer of the NPDES program to States. Further, in January 2001, the Service, National Oceanic and Atmospheric Administration (NOAA), and EPA entered into a Memorandum of Agreement (MOA) regarding enhanced coordination under the CWA. Text in the Federal Register accompanying the published MOA noted EPA's practice of consulting with the

Services on NPDES program approvals. However, these earlier consultations and the adoption of the MOA predated our latest implementation of ESA Section 7 in connection with Arizona's Section 402(b) application. The prominence of the statutory mandate in Section 402(b) and the impact of that Congressional mandate on the Service's evaluation of indirect effects had not received serious consideration in those earlier decisions. The consultation on the Arizona application, together with a more extensive examination of the statutory and regulatory provisions that govern the Section 7 consultation requirement and our evaluation of recent court rulings, also now lead us to conclude that EPA is not required to consult on applications to approve State programs under Section 402(b) of the CWA.

The Arizona consultation process made clear that EPA's approval of Arizona's application should not properly be regarded as the legal cause of future development in Arizona that would require an NPDES permit from the State, or of any impact on listed species as a result. The Service recognized that, due to the stated intent of the Congress in Section 402(b) of the CWA, State programs that meet the requirements of that section shall be approved, and any evaluation of indirect effects arising from that decision would be speculative at best. Biological Opinion at 21. Our conclusion is supported by the Supreme Court decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which held that it is necessary to take into account the purposes and policies behind a particular statutory regime in determining questions of causation and federal agency responsibility for future effects that may arise from agency actions.

In the evaluation of the Arizona application, the Service was struck by the lack of EPA discretion to address future development effects that might arise once the State program was approved. The Service was also aware of the Congressional mandate that compels EPA to approve State NPDES programs if the statutory criteria are satisfied. The mandatory legal requirements that pervade EPA's decision-making process under Section 402(b) convinced the Service that there is no significant causal linkage between EPA's decision under Section 402(b) and possible future development activities. This conclusion played a predominant role in the Service's decision to issue a "non-jeopardy" biological opinion on the proposed EPA decision to approve the Arizona application. As we pointed out in the Biological Opinion concerning the Arizona application, we have construed Section 7(a) to require consideration of direct effects of an agency's proposed action (which are not at issue here) and "indirect effects" as defined in 50 C.F.R. 402.02—i.e., effects that are *both* "caused by the proposed action" *and* are "later in time, but still reasonably certain to occur." See Biological Opinion at 20. Applying that standard, we concluded that any development that occurred after Arizona assumed responsibility for the program – and hence any resulting impact on listed species or their critical habitat – would not be "caused" by EPA's approval of Arizona's application, but instead would be due to Congress's mandate that an application be approved if specified criteria are satisfied. *Id.* at 20-21, 22-23.

In retrospect, the Service could have halted the consultation process on the Arizona application once it determined that the mandatory nature of the Section 402(b) meant that EPA's action would not be the cause of possi-

ble future development activities within the State. Biological Opinion at 23. In light of our Arizona experience and the interpretations noted below—and because EPA has interpreted Section 402(b) to mandate approval of a State's application where (as in the Arizona case) the specified criteria are satisfied—there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies. Even if adverse effects from future private development activities had been anticipated in the context of the proposed approval of Arizona's program, such adverse effects result from *Congress's* decision to mandate the approval of the State's NPDES program–*not* from EPA's "action" per se. See *Public Citizen*, 541 U.S. at 769. The federal agency action in this instance–EPA's mandated role to approve State programs under narrowly-crafted statutory criteria–would not include or be responsible for any future effects that may arise under the State program because those effects are not part of or caused by the "agency action" for purposes of Section 7(a)(2) and the definition of "action" in 50 C.F.R. § 402.02. Section 7(a)(2) applies to "any action authorized, funded, or carried out" by EPA, and in this instance we are satisfied that the Congress has deliberately circumscribed the role "carried out" by EPA. Under Section 402(b) of the CWA, EPA carries out the limited function of comparing a state NPDES program to the narrow criteria of the statute. If the criteria are met, Congress has determined that the state NPDES permitting regime is approved. Future adverse effects, if any, from the state's permitting activities are the result of an Act of Congress, not a result of EPA's narrow adminis-

trative decision. We agree that EPA's role in the approval process established by Congress does not make it responsible for impacts to listed species from any resulting state-issued permits, and EPA is not subject to the duties of ESA Section 7(a)(2) in this instance.

We agree with your assertion that the ESA does not override limitations on EPA's substantive authority under Section 402(b) of the CWA. The legislative history reveals that Section 7 originated as a single paragraph in which agencies were instructed to "utilize their authorities" to both carry out programs for the conservation of listed species and to insure that actions authorized, funded or carried out by the agency avoided jeopardy or destruction of critical habitat. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). When Congress separated Section 7 into separate sentences in 1978, it explained that this revision merely restated "existing law." See H.R. Conf. Rep. No. 95-1804, at 18 (1978), reprinted in 1978 U.S.C.C.A.N. 9484, 9486. The sentence containing the no-jeopardy requirement was simply a particular and mandatory application of the general provision in the preceding sentence for agencies to utilize their authorities in furtherance of the purposes of the Act in carrying out conservation programs. Section 7(a) was then broken into separate subsections the following year, Pub. L. No. 96-159, Sec. 4, 93 Stat. 1226, but again without substantive change. Thus, we agree with your conclusion that Congress intended the "utilize their authorities" limitation to apply fully to Section 7(a)(2). This legislative history confirms that this provision does not override limitations on EPA's authority under a statute such as CWA 402(b). Without repeating the cases you cited in your letter, courts likewise have determined that there is nothing in the language of the

ESA to indicate that Congress intended for Section 7 to override limitations on existing agency authority.

This interpretation of section 7 is also reflected in the statute and regulations related to reasonable and prudent alternatives (RPAs), which are necessary if a proposed action is likely to cause jeopardy or adverse modification. The ESA states that the Secretary "shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and *can be taken by the Federal agency* or applicant in implementing the agency action." ESA Section 7(b)(3)(A) (emphasis added). Further, the regulations limit RPAs to actions that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. §402.02. The preamble to those regulations states that in order for an alternative to be reasonable and prudent, it "should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction." 51 Fed. Reg. 19937 (1986).

Further, we agree with your assertion that the section 7 regulations specifically limit the applicability of Section 7 duties to discretionary agency actions. The Section 7 regulations clearly state that the consultation requirement applies to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. The regulations also limit reinitiation of consultation to those situations where "discretionary" involvement or control has been retained. 50 C.F.R. § 402.16. Further, the preamble to these regulations notes that a Federal agency's responsibilities under section 7(a)(2) cover the range of "discretionary authority" held by that agency. 51 Fed. Reg. 19937 (1986). Consistent with our

analysis of the statute as expressed above, this regulation makes clear that Section 7 does not require agencies to act on grounds of species protection where the agency, either because of statutory limitations or previous contractual obligation, lacks legal discretion to do so. This letter confirms our interpretation of the regulation, 50 C.F.R. 402.03, which the Ninth Circuit misconstrued in *Defenders of Wildlife*. That regulation thus reinforces our conclusion in connection with the Arizona approval and here that EPA's approval of a state application is not the cause of any impacts that activities requiring NPDES permits may have on listed species or their critical habitat.

For the above reasons, and taking into consideration the cases cited in your letter, we concur with EPA's interpretations of the ESA and the Services' regulations as applied to EPA approvals of State NPDES programs under CWA § 402(b). Further, we request that the Service, NOAA, and EPA meet to discuss the MOA to determine if adjustments should be made to reflect these interpretations.

Sincerely,

/s/ H. DALE HALL
H. DALE HALL
Director

APPENDIX E

[Seal Omitted] **United States Department of Commerce**
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

THE DIRECTOR

[Dated: Oct. 18, 2006]

Benjamin H. Grumbles
Assistant Administrator
United States Environmental Protection Agency
Office of Water
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Grumbles:

In a letter dated October 13, 2006, the Environmental Protection Agency (EPA) requested that the National Marine Fisheries Service (NMFS) indicate its position concerning EPA's obligation to consult under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536 (a)(2), when EPA takes action on a State's application to administer the National Pollutant Discharge Elimination System (NPDES) program pursuant to Section 402(b) of the Clean Water Act (CWA), 33 U.S.C. § 1342(b).

Your letter states that EPA has no discretion to disapprove such an application based upon criteria that are not

listed in Section 402(b) itself, and that protection of listed species is not within any of the listed criteria. You state your understanding that Section 7 of the ESA does not expand EPA's authority to address the protection of listed species if Congress limited the Agency's ability to consider such concerns. You further note that regulations issued by the Department of the Interior and the Department of Commerce interpret ESA Section 7 duties as inapplicable if an agency lacks "discretionary involvement or control" over its action sufficient to benefit listed species or designated critical habitat. 50 C.F.R. § 402.03. Accordingly, your letter concludes that Section 402(b)'s mandate to approve State applications precludes the jeopardy avoidance and consultation duties of ESA Section 7(a)(2). You asked for confirmation that NMFS agrees with your analysis with regard to ESA Section 7 and its implementing regulations. As discussed below, and consistent with your conclusion on the lack of discretion under the CWA in rendering EPA's approval, we concur with your conclusion.

As you are aware, NMFS previously consulted with EPA on the transfer of the NPDES program to States. Further, in January 2001, NMFS, the Fish and Wildlife Service, and EPA entered into a Memorandum of Agreement (MOA) regarding enhanced coordination under the CWA. The MOA included provisions for consultation on the transfer of the NPDES program. However, these earlier consultations and the adoption of the MOA did not fully consider the impacts of the statutory mandate in Section 402(b) of the CWA on the agencies' responsibilities under Section 7 of the ESA.

We have reexamined these issues and conducted a more extensive examination of the statutory and regulatory

provisions that govern Section 7 consultation in view of the State of Alaska's recent application to EPA to administer the NPDES program there. We also take note of the consultation between EPA and the Fish and Wildlife Service on the Arizona application to administer the NPDES program in that State, the consequent decision in *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005), *rehearing en banc denied*, 450 F.3d 394 (2006), and other recent court rulings. We now conclude that EPA is not required to consult on applications to approve State programs in situations under Section 402(b) of the CWA.

We agree that the ESA does not override limitations on EPA's substantive authority under the CWA. The legislative history reveals that Section 7 originated as a single paragraph in which agencies were instructed to "utilize their authorities" to both carry out programs for the conservation of listed species and to insure that actions authorized, funded or carried out by the agency avoided jeopardy or destruction of critical habitat. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). When Congress separated Section 7 into separate sentences in 1978, it explained that this revision merely restated "existing law." See H.R. Conf. Rep. No. 95-1804, at 18 (1978), reprinted in 1978 U.S.C.C.A.N. 9484, 9486. The sentence containing the no-jeopardy requirement was simply a particular and mandatory application of the general provision in the preceding sentence for agencies to utilize their authorities in furtherance of the purposes of the Act in carrying out conservation programs. Section 7(a) was then broken into separate subsections the following year, Pub. L. No. 96-159, Sec. 4, 93 Stat. 1226, but again without substantive change. Thus, Congress intended the "utilize their au-

thorities" limitation to apply fully to Section 7(a)(2). This legislative history confirms that this provision does not override limitations on EPA's authority under a statute such as CWA Section 402(b). Without repeating the cases cited in your letter, courts likewise have determined that there is nothing in the language of the ESA to indicate that Congress intended for Section 7 to override limitations on existing agency authority.

This interpretation of section 7 is also reflected in the statute and regulations related to reasonable and prudent alternatives (RPAs), which are necessary if a proposed action is likely to cause jeopardy or adverse modification. The ESA states that the Secretary "shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and *can be taken by the Federal agency* or applicant in implementing the agency action." ESA Section 7(b)(3)(A) (emphasis added). Further, the regulations limit RPAs to actions that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. §402.02. The preamble to those regulations states that in order for an alternative to be reasonable and prudent, it "should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction." 51 Fed. Reg. 19937 (1986).

Further, we agree with your assertion that the Section 7 regulations specifically limit the applicability of Section 7 duties to discretionary agency actions. The Section 7 regulations clearly state that the consultation requirement applies to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. The regulations also limit reinitiation of consultation to those

situations where "discretionary" involvement or control has been retained. 50 C.F.R. § 402.16. The preamble to these regulations notes that a Federal agency's responsibilities under Section 7(a)(2) cover the range of "discretionary authority" held by that agency. 51 Fed. Reg. 19937 (1986). Consistent with our analysis of the ESA as expressed above, this regulation makes clear that Section 7 does not require agencies to act to protect a listed species if the agency, because of statutory limitations, lacks legal discretion to do so. This letter confirms our interpretation of the regulation.

Our conclusion also is supported by the Supreme Court decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which held that the purposes and policies behind a particular statutory regime should be taken into account in determining questions of causation and federal agency responsibility for future effects that may arise from agency actions. In the context of Section 7 consultation, the Services have construed the ESA to require consideration of both "direct effects" and "indirect effects" of an agency action. See 50 C.F.R. §§ 402.02, 402.14(g). As stated in your letter, State programs that meet the requirements of Section 402(b) of the CWA must be approved, and any evaluation of the effects arising from that decision would be speculative. Any such adverse effects therefore result from Congress's decision to mandate the approval of the State program—not from EPA's "action." See *Public Citizen*, 541 U.S. at 769. The federal agency action in this instance—EPA's mandated role to approve State programs under narrow statutory criteria—would not include or be responsible for any future effects that may arise under the State program because those effects are not part of or caused by the "agency action" for purposes of Section

7(a)(2) and the definition of "action" in 50 C.F.R. § 402.02. Section 7(a)(2) applies to "any action authorized, funded, or carried out" by EPA, and in this instance we are satisfied that the Congress deliberately circumscribed the role "carried out" by EPA. Under section 402(b) of the CWA, as EPA has interpreted it, EPA carries out the limited function of comparing a State NPDES program to the narrow criteria of the statute. If the criteria are met, Congress has determined that the state NPDES permitting regime should be approved. Future adverse effects, if any, from the State's permitting activities are the result of an Act of Congress, not a result of EPA's narrow administrative decision. We agree that EPA's role in the approval process established by Congress does not make it responsible for impacts to listed species from any resulting state-issued permits, and EPA is not subject to the duties of ESA Section 7(a)(2) in this instance.

For the above reasons, we concur with EPA's conclusion that EPA is not required to engage in Section 7 consultation on applications to approve State programs in situations under Section 402(b) of the CWA.

Sincerely,

/s/ WILLIAM T. HOGARTH III
WILLIAM T. HOGARTH, Ph.D.
Assistant Administrator
for Fisheries

APPENDIX F

1. 16 U.S.C. 1536 provides in pertinent part:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for' the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an

endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if

the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

* * * * *

2. 33 U.S.C. 1342(b) provides:

National pollutant discharge elimination system

* * * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of th.s title; or

(B) To inspect, monitor, enter, and require re ports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the per mit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be

subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

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(35) (32)

Nos. 06-340, 06-549

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DEFENDERS OF WILDLIFE, *ET AL.* IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Environmental Protection Agency ("EPA") raise in this Court a rationale for avoiding compliance with Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA"), that EPA not only failed to rely on during the administrative proceedings and before the Ninth Circuit issued its ruling, but which the agency expressly disavowed in the administrative proceedings and advised the court of appeals panel it was not arguing?

2. Assuming that the Court considers the merits of EPA's *post hoc* rationalization, whether EPA must comply with Section 7(a)(2) of the ESA in taking final action on Arizona's application for Clean Water Act permitting authority, where Section 7(a)(2)'s consultation and "no jeopardy" requirements apply to "any action" by a federal agency, 16 U.S.C. § 1536(a)(2), and this Court has already construed this language as "admit[ting] of no exception," *TVA v. Hill*, 437 U.S. 153, 173 (1978)?

CORPORATE DISCLOSURE STATEMENT

Respondents Defenders of Wildlife and Center for Biological Diversity are non-profit corporations. They have no parent corporations and there is no publicly held company that owns any stock in either organization.

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COUNTERSTATEMENT

This case concerns the United States Environmental Protection Agency's ("EPA's") "final action authorizing Arizona to implement the NPDES [National Pollutant Discharge Elimination System] program. . . . " 67 Fed. Reg. 79,629, 79,631 (2002), and whether, in taking that action, EPA complied with the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"). Section 7(a)(2) of the ESA provides that "[e]ach federal agency *shall*, in consultation with and with the assistance of the Secretary [of the Interior], *insure that any action authorized*, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species. . . . " 16 U.S.C. § 1536(a)(2) (emphasis added).

Although the plain terms of Section 7(a)(2) apply to the agency action at issue, and despite the fact that this Court has held that the "language [of Section 7] admits of no exception," *TVA v. Hill*, 437 U.S. 153, 173 (1978), EPA and the National Association of Home Builders ("NAHB") seek review of the ruling below on the grounds that "Section 7(a)(2)'s no-jeopardy and ancillary consultation requirements do not apply" to EPA's decision authorizing Arizona to implement the NPDES program. EPA Pet. at 13. Petitioners take this position even though biologists with the Fish and Wildlife Service ("FWS" or "Service") – the federal agency with primary responsibility for implementing the ESA – predicted that the transfer could lead to the extinction of one or more species, and even though EPA itself determined that it was required to comply with Section 7(a)(2) before transferring NPDES authority. *See* EPA Pet. at 23.

Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller ("Defenders") will first describe the legal and factual context, and then explain why the petitions should be denied.

A. Section 7(a)(2) Of The ESA

When Congress enacted the ESA in 1973, its "plain intent ... was to halt and reverse the trend towards species extinction, whatever the cost." *Hill*, 437 U.S. at 184. This intent "is reflected not only in the stated policies of the Act, but in literally every section of the statute," *id.*, including Section 7, which "provides a particularly good gauge of congressional intent." *Id.* at 181.

The ESA's predecessor statute "qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only '*insofar as is practicable and consistent with the[ir] primary purposes....*'" *Hill*, 437 U.S. at 181 (emphasis in original). "Likewise, every bill introduced in 1973 contained a qualification similar to that found in the earlier statutes," *id.*, namely, that other agency mandates "would always prevail [over endangered species concerns] if conflict were to occur." *Id.* at 182 (internal citation omitted). However, the "final version" of the ESA "carefully omitted all of the[se] reservations," and deleted "all phrases which might have qualified an agency's responsibilities" to avoid species extinction. *Id.* This decision to adopt "stringent, mandatory" language, *id.* at 183, reflected

> *an explicit congressional design to require agencies to afford first priority to the declared national policy of saving endangered species.* The pointed omission of the type of qualifying

> language previously included in endangered species legislation reveals a conscious decision by Congress to give *endangered species priority over the 'primary missions' of federal agencies.*

Id. at 185 (emphasis added).

As a consequence, this Court has observed, "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those" in Section 7(a)(2) since the provision's

> very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species. . . . ' This language admits of no exception.

437 U.S. at 173 (emphasis in original; internal citation omitted). In short, the statutory language was "designed . . . [to] *prohibit* [a] federal agency from taking action which does jeopardize the status of endangered species." *Id.* at 179 (emphasis in original; internal citation omitted).[1]

In *Hill*, therefore, the Court ruled that Section 7 "require[d] the permanent halting of a virtually completed dam for which Congress has expended more than $ 100 million." 437 U.S. at 172. The Court so held although

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[1] In 1978, this language was amended to provide that agencies' obligation is to "insure" that their actions are "not likely to jeopardize" the continued existence of species or result in the destruction of critical habitat, 16 U.S.C. § 1536(a)(2), but Congress did not restrict the scope of "actions" to which the provision applies.

"Congress continued to appropriate large sums of public money for the project," even after being apprised of the project's conflict with the survival of an endangered fish species. *Id.*

In response to *Hill*, Congress did not narrow the universe of federal "actions" to which Section 7's "no jeopardy" prohibition applies but, rather, created a process for resolving otherwise intractable conflicts between that prohibition and the "primary missions" of federal agencies. *Hill*, 437 U.S. at 185. Thus, the 1978 amendments "created a process by which actions authorized, funded, or carried out by Federal agencies *could be exempted* from the provisions of the Act." S. Rep. No. 97-418 (1982) ("1982 Senate Report"), *reprinted in* NAHB Appendix ("NAHB App.") at 531 (emphasis added).

In particular, the amendments allowed any agency or affected private party to "apply . . . for an exemption" if the FWS has determined that the "agency action would violate" Section 7(a)(2), but the Service and agency are unable to agree on a "reasonable and prudent alternative" that could be carried out by the agency. 16 U.S.C. § 1536(g)(1), (3). Congress created a detailed process for the assessment of such applications – including consideration by an "Endangered Species Committee" composed of high-ranking federal officials, including the Administrator of EPA, *id.* § 1536(e)(1), (3) – and also spelled out criteria for evaluating exemption requests. *Id.* § 1536(h)(1). Hence, the "basic premise" of Congress's response to *TVA v. Hill* was that "the integrity of the interagency consultation process designated under section 7 of the Act be preserved," and that "[o]nly in those instances where the consultation process has been exhausted and a conflict still exists should the Endangered Species Committee

consider granting an exemption for a Federal action." 1982 Senate Report, NAHB App. 532.

In its present form, Section 7(a)(2) provides that "[e]ach Federal agency shall, in consultation with and with the assistance" of the FWS – which consults on behalf of the Interior Department – "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of a species' "critical" habitat. 16 U.S.C. § 1536(a)(2). Under FWS regulations, each "action agency" must first determine if a proposed action "may affect" a listed species or critical habitat; if so, the agency must request "formal consultation" with the Service, unless the Service concurs that the project is unlikely to "adversely affect" the species. 50 C.F.R. § 402.14(a), (b).

The formal consultation process culminates in a "Biological Opinion" ("BiOp") that must "[e]valuate the effects of the action," and determine whether they are "likely to jeopardize" any listed species. 50 C.F.R. § 402.14(g)(3), (4). This analysis must include all "indirect effects," which are those effects "caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.* § 402.02. The agency must then determine "whether and in what manner to proceed," *id.* § 402.15(a), so as to ensure that its "action" does not "jeopardize" any listed species, or "result in" the destruction of "critical" habitat. 16 U.S.C. § 1536(a)(2). For example, if the FWS finds that the action will result in jeopardy, the action agency must determine whether to adopt any "reasonable and prudent alternatives" proposed by the Service to avoid that result. *Id.* § 1536(b)(3)(A). If, however, no such alternatives exist, the agency can proceed

with the action only by seeking an exemption from the Endangered Species Committee. *Id.* § 1536(e).[2]

B. Pertinent Provisions Of The CWA

The overarching objective of the Clean Water Act ("CWA") – which was enacted one year *before* the ESA – is to "restore and maintain the chemical, physical, and *biological integrity* of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). The statute establishes a "national goal" of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife. . . . " *Id.* § 1251(a)(2). In light of the CWA's purpose to restore the "biological integrity" of the nation's waters, *id.* § 1251(a), both EPA and FWS have declared that they "find the goals of the CWA and ESA compatible and complementary." 66 Fed. Reg. 11,202, 11,208 (2001); *see also* Court of Appeals Excerpts of Record ("Ct. App. ER") at 51 (the "goal of the CWA . . . is consistent with the ESA's purpose") (internal citation omitted).

The CWA authorizes EPA to issue permits for the discharge of pollutants into navigable waters. 33 U.S.C.

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[2] The ESA regulations also establish an "optional process" known as "[i]nformal consultation," during which the "Service may suggest modifications to the action" for the purpose of avoiding adverse impacts on listed species, and hence bypassing formal consultation. *See* 50 C.F.R. § 402.14(a), (b). The FWS routinely conducts thousands of such consultations with action agencies each year and, in the vast majority of cases, the Service concludes that minor or no changes are needed to address the needs of listed species. *See* FWS, *Budget Justifications and Performance Information, Fiscal Year 2007* 87 (of 76,000 consultations conducted in FY 2005, 73,000 were "informal," *i.e.*, the FWS and action agency agreed that the actions could be pursued without adversely affecting a listed species).

§ 1342(a). When EPA issues such a permit for an activity that "may affect" a listed species or critical habitat, EPA consults with the Service under Section 7(a)(2) of the ESA in an effort to avoid or mitigate such impacts. *See* 50 C.F.R. §§ 402.13, 402.14.

Section 402 of the CWA also allows states to apply to EPA for authorization to administer the permitting program, albeit with ongoing oversight by EPA. *See* 33 U.S.C. § 1342(b). The statute provides that EPA "shall approve" the transfer of permitting authority if EPA finds that a state has satisfied nine criteria – which range from the very broad to the very specific. *Id.* Contrary to petitioners' characterization, however, EPA can and does exercise considerable discretion in applying many of these criteria, several of which clearly implicate wildlife-related impacts.

For example, the first criterion EPA considers is whether the State has "adequate authority" to "apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title." 33 U.S.C. § 1342(b)(1)(A). In turn, one of the listed sections provides for the establishment of "effluent limitations" for a "point source or group of point sources" whenever such "limitations" are needed, among other things, to "assure . . . the protection and propagation of a balanced population of shellfish, fish and wildlife. . . . " *Id.* § 1312(a). Similarly, 33 U.S.C. § 1311, another of the CWA sections listed in the transfer provision, requires that all permits must satisfy "any applicable water quality standard established pursuant to this chapter," *id.* § 1311(b)(1)(C), and the "water quality standard[s]" issued by EPA and/or States "shall be established taking into consideration their use and value for . . . *propagation of fish and wildlife*,"

among other "designated uses." *Id.* § 1313(c)(2)(A) (emphasis added).

Accordingly, EPA has the authority under the CWA to evaluate the sufficiency of the State's program to comply with "limitations" and "standards" designed for the "protection and propagation of fish, shellfish, and wildlife." *See* NAHB App. 84-85 ("The CWA directs States to take into consideration, among other things, the 'propagation of fish and wildlife' ") (internal citation omitted). If EPA "determines" that a State's program is not "adequate" in that regard, then it must deny the transfer of authority. 33 U.S.C. § 1342(b).

After EPA transfers NPDES authority, the CWA and implementing regulations provide for ongoing federal "oversight" of the State's permitting activities. NAHB App. 97. The State, for example, must advise EPA of each permit it "propose[s]" to issue, 33 U.S.C. § 1342(d)(1), and EPA may "object" to any such permit as being "outside the guidelines and requirements of this chapter." *Id.* § 1342(d)(2); *see also* 40 C.F.R. § 123.44(c). If EPA objects, the State either must address EPA's concerns in the permit, or otherwise permitting authority reverts to EPA. 33 U.S.C. § 1342(d)(4). Under the regulations, States must also provide draft permits to "Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources. . . . " 40 C.F.R. § 124.10(c)(iii). If, however, neither EPA nor any other federal agency takes any "action" with regard to a State-issued permit, then the vital safeguards of the Section 7(a)(2) consultation process will never come into play. 16 U.S.C. § 1536(a)(2).

C. The Federal Agencies' Past Compliance With The ESA And CWA, And The Consultation Conducted In This Case

EPA has already transferred NPDES authority to *45* states (including Arizona) and has routinely conducted Section 7(a)(2) consultations before deciding whether to transfer such authority. *See* EPA Appendix ("EPA App.") at 3a, 7a n.3. Indeed, prior to this case neither EPA nor FWS has suggested that, in taking actions under the CWA, EPA could avoid compliance with Section 7(a)(2). Rather, both agencies have taken the opposite position.

In 2001, after soliciting public comment, EPA and FWS jointly published in the Federal Register a "Memorandum of Agreement" ("MOA") that "address[ed] interagency coordination under" the CWA and ESA, 66 Fed. Reg. 11,202, NAHB App. 245, and was designed to "help ensure that EPA actions *meet the substantive requirements of section 7(a)(2) of the ESA. . . .* " *Id.* at 253 (emphasis added). Instead of providing that EPA's decisions on transferring NPDES authority could *avoid* Section 7(a)(2) entirely – as EPA now argues – the MOA declares that the "ESA requires the involvement of all Federal agencies in the protection and recovery of our Nation's unique biological resources." *Id.* at 274. For that reason,

> *EPA's current practice is to consult with the Services* where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species.

Id. at 260 (emphasis added).

Consistent with this public notice, when Arizona requested permitting authority, EPA, in soliciting comments

on the State's application, advised the public that EPA "will not make a final decision on AZPDES program approval until after . . . completion of the ongoing consultations with the [FWS] on effects program approval may have on endangered or threatened species and their designated critical habitat. . . . " 67 Fed. Reg. 49,916, 49,917 (2002), NAHB App. 546. EPA further stated that it is

> *required by [the ESA]* . . . to consult with other federal agencies before making a federal decision in this matter . . . *[T]he ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service* on the effects of federal actions on endangered species. *EPA has determined that its action on the AZPDES program application constitutes a federal action that is subject to section 7 of the ESA.* Section 7(a)(2) of the ESA places a statutory requirement (*separate and distinct from CWA section 402(b)*) for EPA to ' * * * insure that any action . . . * * * is not likely to jeopardize the continued existence of any endangered species or threatened species'. . . .

Id. at 548 (emphasis added); *id.* at 559 ("[A]pproval of the State permitting program under section 402 is a federal action subject to this requirement [ESA section 7(a)(2)]").

Accordingly, to comply with Section 7(a)(2), EPA "request[ed] the initiation of formal consultation" with FWS on the "effects of the USEPA's proposed approval of the AZPDES program on Federally-listed" species. NAHB App. 583. EPA also provided FWS with a "Biological Evaluation" ("BE") that acknowledged that "all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters in Arizona *may be affected by the action.*" *Id.* at 614 (emphasis added). EPA attached

to the BE a list of *60* endangered and threatened species that could be harmed by the transfer of authority. *Id.* at 621-23.

EPA further recognized that, "[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 processes for consultation will no longer apply," since the State, rather than EPA, will generally be making permit decisions. NAHB App. 615. Thus, "there will be a reduction in the number of mechanisms available to the Service to protect Federally-listed species and designated critical habitat in Arizona." *Id.*

During the consultation, FWS biologists concluded that, in the absence of effective State or other safeguards to protect listed species following the transfer, the proposed action would have a "devastating effect" on listed species, Ct. App. ER 64, and, indeed, that it would jeopardize the continued existence of several such species. *Id.* at 69-72. This concern was based on the fact that Section 7(a)(2) consultations on NPDES permits in Arizona have in fact proven essential in avoiding and mitigating the effects of large construction projects on several species, but that these "[g]reat strides in minimizing the disturbance of construction projects . . . will be diminished, if not lost" upon transfer of authority to Arizona because the State lacks sufficient safeguards for imperilled species. Ct. App. ER 68; *id.* ("[T]his action is more than a shift in program authority; we will lose our Section 7 nexus for consultation and construction projects . . . will destroy important habitat and adversely affect listed species.").

Thus, in its discussions with EPA, FWS took the position that the BiOp on the proposed transfer of authority

"must evaluate the indirect effects associated with the proposed action," and that these effects *"will appreciably reduce the conservation status"* of several listed species due to the inadequate State or other safeguards for these species. Ct. App. ER 117 (emphasis added). However, even though EPA conceded that "the approval of the State permitting program . . . is a federal action subject to this [Section 7(a)(2) consultation] requirement," 67 Fed. Reg. 49,916, 49,919, Ct. App. ER 77, the agency nonetheless maintained "that its proposed approval of the Arizona NPDES program will not result in jeopardy" because the loss of valuable species protections did not qualify as an "indirect effect" of the transfer within the meaning of the ESA implementing regulations. Ct. App. ER 119-120.

After this inter-agency disagreement was "elevated" to Interior Department and EPA officials in Washington, D.C., Ct. App. ER 116-127, FWS produced a BiOp that acknowledged that "we have expressed concerns that the approval will result in a loss of section 7 consultation-related conservation benefits," NAHB App. 111-12, and that the loss of those benefits was "an indirect effect" that "will appreciably reduce the conservation status" of listed species. *Id.* The BiOp further stressed that, as a result of the transfer of authority, there "will be a reduction in the number of mechanisms available to both of our agencies to protect federally-listed species and critical habitat in Arizona." *Id.* at 117.

Yet, while acknowledging that listed species would lose vital ESA safeguards, the FWS failed to include in the BiOp any analysis of whether this loss will *in fact* result in the extinction of listed species, nor did the Service establish that the loss of Section 7(a)(2) protections would be offset by any other conservation measures. Instead, the

BiOp concluded that the "action, as proposed is not likely to jeopardize" the affected species because the "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program," but, rather, by "Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." NAHB App. 114, 116. The FWS made no effort to explain how this rationale could be reconciled with *Hill*, in which identical reasoning – *i.e.*, that it was *Congress's* decision to fund the Tellico dam that was actually causing the extinction of the species at issue there – was squarely rejected as contrary to Section 7. *See* 437 U.S. at 172.

D. The Ruling Below

In ruling that EPA's reliance on the FWS's BiOp was arbitrary and capricious, the court of appeals first stressed that EPA had "definitively stated several times during the decisionmaking process, including when announcing the final decision, that section 7 requires consultation regarding the effect of a permitting transfer on listed species." EPA App. 23a. Having made that determination, the court reasoned, EPA could not lawfully conclude that its transfer decision could not possibly result in any effects to listed species because EPA "has no authority to disapprove transfer applications" due to "an impact on listed species, section 7(a)(2) of the [ESA] notwithstanding." *Id.* at 25a.

Rather, the court found that this rationale reflected a "nonsensical" view of Congressional intent, under which EPA was required to consult "but had no authority to do anything concerning the matter about which it had to consult," *e.g.*, EPA would have to transfer NPDES

authority *even if doing so would admittedly result in the extinction of a species*. *Id.* at 25a, 26a. Thus, EPA's recognition that, pursuant to Section 7(a)(2), it *must* consult before making a transfer decision necessarily meant that the agency had the corollary duty to take into account the anticipated effects of the transfer on listed species, since "[s]ection 7(a)(2) makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species." *Id.* at 26a (emphasis in original). Rather, "*both* apply" if any agency "'action' is under consideration." *Id.* (emphasis in original).

Relying heavily on *Hill*, the court also rejected the BiOp's finding that the "loss of section 7 consultation was not an effect of [EPA's] transfer decision. . . . " EPA App. 28a. On the contrary, the court reasoned that, since "section 7(a)(2) speaks in mandatory terms" – and requires agencies to "insure" that their decisions are unlikely to result in the extinction of species – it imposes an explicit "duty" on agencies not to "jeopardize protected species" whenever the agencies affirmatively authorize or otherwise carry out "any action." *Id.* at 31a. The court further reasoned that, in response to *Hill*, Congress had chosen to create the Endangered Species Committee for the purpose of considering granting exemptions to agencies "*after* consultation is completed." *Id.* at 37a (emphasis in original).

The court also found the BiOp to be inadequate because it "never considered in any detail the likely real-world impact of the transfer decision on listed species in Arizona." EPA App. 49a. The court did not rule out the possibility that a transfer decision could be based on an

adequate BiOp but instead simply remanded for a "more careful consideration" of whether "other federal and state statutory provisions" would in fact sufficiently substitute for the protections afforded by the Section 7(a)(2) process. *Id.* at 61a.[3]

REASONS FOR DENYING THE WRIT

I. THE POSITION ADVANCED IN EPA'S PETITION IS A *POST HOC* RATIONALIZATION THAT THE COURT SHOULD NOT CONSIDER.

As EPA's petition acknowledges, the legal position that EPA is now advancing – *i.e.*, that the "no jeopardy" and consultation requirements of Section 7(a)(2) have no legal relevance to the NPDES transfer decision, EPA Pet. at 22 – was *not* the position that the government took either in the administrative proceedings or before the court below. *Id.* at 23 ("At both the beginning and the end of its consideration of Arizona's transfer application, however, EPA expressed the view that consultation concerning that application was required by the ESA."). To the contrary, both EPA and FWS "definitively stated" during the administrative process – as well as in their 2001 published MOA – that EPA must comply with Section 7(a)(2). *See* EPA App. 23a.

[3] Judge Thompson dissented on the grounds that EPA's decision to transfer NPDES authority "was not 'agency action' within the meaning of section 7," EPA App. 65a – a rationale that the dissent conceded was not even advocated by EPA, *id.* at n.1, and that the government has relegated to a footnote here. *See* EPA Pet. at 13 n.4.

Plainly, therefore, the government's newly minted position that Section 7(a)(2) is "altogether inapplicable" to EPA's transfer decision, EPA Pet. at 25 n.10, is the quintessential *post hoc* rationalization that should not even be *considered* by this Court, let alone serve as a basis for review. *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *see also American Textile Mfs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981) (*post hoc* rationalizations "cannot serve as a sufficient predicate for agency action"); *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (if an agency's finding "is not sustainable on the administrative record made, then the decision must be vacated and the matter remanded. . . . ").

That EPA is essentially urging the Court to flout basic administrative law principles to sustain a position that the agency did not even raise below is apparent from EPA's petition and the *non*-record materials that EPA has felt compelled to include in its Appendix. EPA concedes that its position, as embodied in the Administrative Record, was that it must comply with Section 7(a)(2), *see* EPA Pet. at 22, and that the court below was "correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand." *Id.* Despite these concessions, EPA nonetheless maintains that this Court's review is warranted because the "relevant federal agencies have *since*" – *i.e.*, since the agency decision under review was made – "*clarified their understanding* of the legal principles that govern in this setting." *Id.* (emphasis added).

But this "clarification" of the agencies' "understanding" – which is actually a complete *reversal* of their long-standing view that EPA must comply with Section 7(a)(2) in making NPDES transfer decisions – took place not only long after EPA decided to transfer authority to Arizona, but many months after the Ninth Circuit issued the ruling

under review. Indeed, the new position – which is reflected in an *October 2006* exchange of letters between EPA and FWS concerning Alaska's application for NPDES authority, *see* EPA App. 93a-116a – was devised at the same time that EPA was asking this Court for two extensions of time to file its petition for certiorari. *See* EPA's 9/26/06 Application for a Further Extension of Time. Accordingly, these letters are neither in the Administrative Record nor even in the Court of Appeals record. Instead, having lost below, EPA evidently set out to manufacture a new record with a different position that the agency now asks this Court to endorse. It could hardly be plainer that the position on which EPA's petition is predicated is the worst sort of *post hoc* justification that this Court has repeatedly ruled may not serve as the basis for *any* judicial review of agency action.

If EPA wishes to adopt an entirely new position on whether it must comply with Section 7(a)(2) when deciding whether to transfer NPDES authority, it may do so, provided that it follows proper procedures and adequately explains its reversal of position from the one that it previously announced to the public following notice and comment proceedings. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) ("*State Farm*"). Indeed, notwithstanding the ruling below, EPA is evidently in the process of changing its position on its Section 7(a)(2) obligations in connection with Alaska's application for authority. *See* EPA App. 93a-116a. But EPA's shift of position counsels strongly in favor of denying, not granting, the petitions in this case, in which EPA asks the Court to run roughshod over rudimentary principles of administrative law and, in effect, to

disregard the agency positions, as set forth in the record, on which the court below properly relied.[4]

II. THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS THAT NECESSITATES REVIEW BY THIS COURT.

Petitioners' contention that there is an inter-circuit conflict that necessitates review is also mistaken. The two rulings on which petitioners rely – *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992) ("*Platte River*") and *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) ("*American Forest*") – do not directly conflict with the ruling below, let alone support EPA's new position that Section 7(a)(2) has no bearing on NPDES transfer decisions.

In *Platte River* the D.C. Circuit addressed the "need for wildlife protective conditions in the annual licenses issued to two hydroelectric projects on the Platte River." 962 F.2d at 30. Contrary to EPA's new position here, the Federal Energy Regulatory Commission ("FERC") "*did*

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[4] In implicitly acknowledging that it is asking the Court to endorse a *post hoc* rationalization, EPA asserts that, "despite the government's reluctance to urge the court of appeals to rest its decision on the view that Section 7(a)(2) is altogether inapplicable to the mandatory transfer decision," there is "no obstacle to this Court's review" because "[b]oth the State of Arizona and private intervenors squarely raised the issue. . . . " EPA Pet. at 25 n.10. It is, however, a bedrock axiom of administrative law that an "agency's action must be upheld, if at all, *on the basis articulated by the agency itself.*" *State Farm*, 463 U.S. at 50 (emphasis added); *Chenery*, 332 U.S. at 196 (courts "must judge the propriety of [agency] action *solely by the grounds invoked by the agency*") (emphasis added).

consult informally with FWS – and largely *did* adopt FWS' recommendations." *Id.* at 33 n.2 (emphasis added). In particular, FERC imposed on one of the two licensees several "emergency measures" deemed "necessary to prevent irreversible environmental damage" to listed bird species. *Id.* at 31. In view of those measures and the fact that Section 7(a)(2) consultation *had* been conducted, the court in that case was simply not called on to decide whether Section 7(a)(2) could be avoided entirely; in particular, the court did not address *any* contention that FERC was authorizing actions that would, in violation of Section 7(a)(2), jeopardize the continued existence of any listed species or destroy any critical habitat.[5]

Instead, conservation groups argued that FERC should have gone even further than the wildlife protection measures adopted through the consultation process by imposing *additional* conditions on the second project, which FERC had licensed in 1941 and for which FERC had determined it could not, under the license and FERC's statutory authority, "impose conditions unilaterally." 962 F.2d at 30. In rejecting that specific argument, however, the D.C. Circuit focused its analysis *not* on Section 7(a)(2) but, rather, on a *different* part of the ESA: Section 7(a)(1), 16 U.S.C. § 1536(a)(1). That provision imposes a separate obligation on federal agencies to take affirmative steps to "*utilize their authorities* in furtherance of the purposes of

[5] Indeed, in a predecessor case, the D.C. Circuit had remanded on the grounds that it was "not reasonable for FERC, in light of the many years of governmental and private concern over the projects' effects on wildlife habitats, to refuse to even explore or consider the need for some *interim* environmental protections pending the completion of the relicensing proceeding." *Platte River Whooping Crane v. FERC*, 876 F.2d 109, 119 (D.C. Cir. 1989).

[the ESA]" by carrying out "*programs* for the conservation" of species. *Id.* (emphasis added).

Quoting the Section 7(a)(1) language, the D.C. Circuit held that the "statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives," but "does not *expand* the powers conferred on an agency by its enabling act." *Platte River*, 962 F.2d at 34 (emphasis in original) (quoting 16 U.S.C. § 1536(a)(1)). Therefore, the court's analysis, which turns on the qualified language of Section 7(a)(1), is not in conflict with the ruling below which instead relies on the plain language of Section 7(a)(2) in finding that EPA failed to comply with that provision's "no jeopardy" mandate.[6]

The Fifth Circuit's ruling in *American Forest*, which addressed EPA's ESA obligations in the context of a transfer of NPDES authority to Louisiana, also did not resolve the specific issue raised by petitioners here, *i.e.*, whether EPA may disregard Section 7(a)(2) in making a transfer decision. Rather, the narrow issue in that case was whether EPA and FWS could legally condition the transfer of the NPDES program on Louisiana's agreement to enter into binding consultations with the FWS on all *State*-issued permits *after* the transfer. 137 F.3d at 293-94. The Fifth Circuit characterized EPA's legal position that it had such authority as being "virtually the same" as the argument "pressed" in *Platte River*. *Id.* at 298.

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[6] While *Platte River* does cite Section 7(a)(2) in the course of describing the general "obligations of federal agencies such as FERC to cooperate with the Secretary of the Interior in carrying out the directives of the ESA," 962 F.2d at 33, the D.C. Circuit's analysis of the conservation groups' argument specifically cites the Section 7(a)(1) language, which is not at issue in this case. *Id.*

Accordingly, in rejecting EPA's position that it could impose a consultation condition on Louisiana that the court believed was not authorized by the CWA or ESA – *i.e.*, consultation on *State* activities – the Fifth Circuit relied on the reasoning in *Platte River* which, once again, invoked the limiting language in Section 7(a)(1). *See* 137 F.3d at 299 ("We agree that the ESA serves not as a font of new authority but as . . . a directive to agencies to channel their *existing* authority in a particular direction.") (emphasis in original). *American Forest* certainly did *not* hold that EPA could bypass Section 7(a)(2)'s consultation requirement or that provision's prohibition on *any* agency actions that jeopardize the continued existence of listed species.

Indeed, in that case, as here, EPA took the position that it "was required to consult with FWS . . . regarding approval of the [Louisiana] application to satisfy EPA's obligations under ESA section 7(a)(2)." Brief for the Respondents, at 29, *American Forest & Paper Ass'n v. EPA*, No. 96-60874 (5th Cir. July 1, 1997) (reproduced in Addendum to Defenders' Court of Appeals' Reply Brief). Consequently, the Fifth Circuit stated that "[w]hether EPA's approval of Louisiana's permitting program constitutes 'agency' action for ESA purposes is largely beside the point," 137 F.3d at 298 n.6, and, in fact, the court evidently assumed that Section 7(a)(2) *did* "require[] EPA to consult with FWS" before making the transfer decision. *Id.* at 298.[7]

[7] While holding that EPA could not impose a consultation condition on a State, the Fifth Circuit did not suggest what should happen if, following consultation, the FWS were to conclude that transfer of authority would result in the extinction of a species. As explained earlier, if FWS and EPA were unable to devise a "reasonable and

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In short, there is no direct conflict between the ruling challenged by petitioners here – that, in consulting under Section 7(a)(2), FWS and EPA must assess whether the transfer of NPDES authority will, in fact, result in the extinction of any species or the destruction of critical habitat – and the decisions cited by petitioners, which actually resolve different issues and focus on a separate section of the ESA. *See* Supreme Court Rule 10 ("Considerations Governing Review on Certiorari": "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the *same* important matter") (emphasis added).[8]

III. THERE ARE NO PRACTICAL RAMIFICATIONS OF THE RULING BELOW THAT COUNSEL IN FAVOR OF REVIEW.

EPA asserts that there are "substantial practical implications of the court of appeals' decision," EPA Pet. at 21, but it avoids saying what they are or why they counsel in favor of review. In reality, since virtually all federal agencies have, at least since *Hill*, made compliance with Section 7(a)(2) a routine feature of their operations, the ruling below has minimal "implications."[9]

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prudent alternative" to a "jeopardizing" action, EPA's recourse would be to seek an exemption from the Endangered Species Committee established in response to *Hill*. *See supra* at 4.

[8] While the ruling below refers to an "intercircuit conflict," EPA App. 44a, its discussion of the cases actually demonstrates that, as explained above, *Platte River* was based on "section 7(a)(1) language," *id.* 46a, and that the Fifth Circuit "relied on *Platte River*" to resolve a different issue than the one resolved below. *Id.*

[9] As noted earlier, action agencies and FWS engage in thousands of Section 7(a)(2) consultations every year, and in the overwhelming

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Indeed, even with respect to the NPDES program, the ruling will have, at most, a minor impact, since the vast majority of the States have *already* been granted NPDES authority, EPA App. 3a, and many such transfers of authority have occurred *after* Section 7(a)(2) consultation, in accordance with the longstanding position of EPA and FWS on this issue. *Id.* at 7a n.3 ("EPA has followed the section 7 consultation process before transferring permitting authority to states for more than a decade."). Even as to Arizona, the ruling below does not foreclose transfer but, rather, simply requires the federal agencies to first engage in a "more careful consideration of the actual protection" that federally listed species will receive in the absence of Section 7 safeguards. *Id.* at 61a.

Also groundless is EPA's contention that the ruling below " 'would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency.' " EPA Pet. at 21 (internal citation omitted; emphasis in original). In fact, there is nothing in the ruling that suggests that Congress cannot exempt any agency action – including decisions to transfer NPDES authority – from Section 7(a)(2)'s requirements. Indeed, where it has wanted to do so for a particular activity, Congress has taken precisely that approach and courts have honored that intent. *See, e.g., Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (applying rider exempting telescope project from Section 7(a)(2)). That Congress has not seen fit to do so with respect to NPDES

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majority of cases the needs of listed species are easily factored into the agencies' decisionmaking processes. *See supra* at n.2.

transfer decisions further counsels against review by this Court.[10]

IV. THE RULING BELOW IS CORRECT.

The ruling below is not only a correct reading of the plain language of Section 7(a)(2), but it is clearly consistent with this Court's decision in *Hill* and Congress's response to that ruling. If, as this Court held in *Hill*, the plain terms of the jeopardy prohibition of Section 7(a)(2) applied to a massive dam project that had already cost "more than $ 100 million dollars" in public funds, was "near completion" when the ESA was enacted, 437 U.S. at 172, 174, 184, and for which "Congress had continued appropriations . . . with full awareness of the [endangered species] problem," *id.* at 167, then it cannot plausibly be the case that the same provision has no relevance to EPA's "final action authorizing" transfer of CWA permitting authority to Arizona, 67 Fed. Reg. 79,631 – an action which, EPA conceded, could affect 60 listed species. *See supra* at 11. Rather, if petitioners do not like the consequences of this Court's ruling that, in enacting the Section 7(a)(2) consultation process, Congress intended to "give endangered species priority over the 'primary missions' of

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[10] Petitioners argue that the ruling below construed Section 7(a)(2) broadly, but the ruling also contains important limitations. Consistent with the language of Section 7(a)(2), the court below reasoned that the no-jeopardy mandate comes into play when the "agency engages in an *affirmative* action that is . . . within its decisionmaking authority." EPA App. 38a (emphasis added). That limitation has already been relied on by the Ninth Circuit to *reject* a Section 7(a)(2) claim where an agency did not take any "'action' triggering a consultation duty." *Western Watersheds Project v. Matejko*, Nos. 05-35178, 05-35208, 2006 WL 3079147 *8 (9th Cir. July 24, 2006, revised Nov. 1, 2006).

federal agencies," *id.* at 185 (internal citation omitted), then their proper recourse is to Congress, not to this Court.

Even aside from *Hill*, it is impossible to reconcile EPA's and NAHB's position with well-entrenched principles of statutory construction. One such principle – to which EPA only pays lip service – is that "'[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" EPA Pet. at 10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) (courts should strive to adopt interpretations that "give effect to each" law "while preserving their sense and purpose.").

Here, the most straightforward way of "giv[ing] effect" to each law is to conclude, as did the court below, that EPA must apply the CWA criteria established in 1972, but that it must *also* "insure" – pursuant to the separate Section 7(a)(2) requirement imposed on it (and all agencies) in 1973 – that the transfer is "not likely to jeopardize the continued existence of any" listed species. 16 U.S.C. § 1536(a)(2). In sharp contrast, EPA's approach does not "give effect" to Section 7(a)(2) at all; instead, it would require the Court to hold, in effect, that "*any* action" somehow does not encompass the agency action at issue here, and hence that EPA may blithely ignore Section 7(a)(2)'s consultation process and "no jeopardy" mandate. *Id.* (emphasis added).[11]

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[11] While the ESA and CWA can be harmonized with little difficulty, even if they were found to be in unavoidable conflict, the correct result would not be for the Court to disregard Section 7(a)(2). Rather, it has

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That petitioners' approach requires the Court to contort the plain terms of Section 7(a)(2) is also apparent from their comparison of that provision with Section 7(a)(1). Petitioners concede that Section 7(a)(1) only directs agencies to "*utilize their authorities* in furtherance of the purposes" of the ESA, 16 U.S.C. § 1536(a)(1) (emphasis added), whereas Section 7(a)(2) contains no such limiting language in prohibiting agencies from jeopardizing listed species. *See* EPA Pet. at 14-16. However, petitioners argue that the Court should, in effect, rewrite Section 7(a)(2) by inserting the qualification that Congress left out. *Id.* But that approach would contravene the "general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal citation omitted).[12]

Petitioners argue that such judicial rewriting of the statutory language is appropriate because, when Congress adopted Section 7(a)(2) in its present form, Congress did not reiterate, in the legislative history, that it really meant

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long been "well-settled" that "[w]here provisions in [] two acts are in irreconcilable conflict, *the latter act to the extent of the conflict constitutes an implied repeal of the earlier one . . . .*" *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (emphasis added); *see also Hill*, 437 U.S. at 192.

[12] Since, under petitioners' approach, Section 7(a)(2) would add nothing of substance to Section 7(a)(1), their argument also contravenes the " 'cardinal principle of statutory construction . . . [that] [i]t is our duty to give effect, if possible, to every clause and word of a statute. . . . ' " *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal citation omitted).

it when it said that "[e]ach federal agency shall . . . insure that any action . . . is not likely to jeopardize" any listed species. *See* EPA Pet. at 17. It is, however, a novel notion of statutory construction that Congress's *silence* in legislative history can be invoked to justify disregarding the plain terms of a statute. *Cf. Barnhart*, 534 U.S. at 450 (statutory construction "inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent'") (internal citation omitted). In any event, as the ruling below explains, the legislative history simply reinforces that Congress intentionally omitted "'any type of qualifying language from'" Section 7(a)(2), EPA App. 38a (quoting H.R. Rep. No. 95-1625 at 10 (1978)), and instead adopted the Endangered Species Committee process as the sole vehicle for resolving otherwise intractable conflicts between the needs of listed species and the "'primary missions of federal agencies.'" *Id.*[13]

Equally misplaced is petitioners' reliance on a FWS regulation that provides that "'Section 7 . . . appl[ies] to all actions in which there is *discretionary* Federal involvement or control.'" EPA Pet. at 18 (emphasis in original) (quoting 50 C.F.R. § 402.03). The simple answer is that

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[13] EPA acknowledges that the "1978 amendments softened the practical effect of the decision in *Hill* by creating the Endangered Species Committee," EPA Pet. at 16, but EPA never explains why this is not the congressionally mandated mechanism for resolving any irreconcilable conflict that might arise between the CWA and Section 7(a)(2). Once again, Congress has clearly mandated that "any" action that will result in jeopardy to a listed species or destruction of critical habitat can go forward *only* if either (a) the action agency agrees to implement a "reasonable and prudent alternative" recommended by FWS, or (b) the agency obtains an "exemption" from the Endangered Species Committee. 16 U.S.C. § 1536(b), (e), (h).

EPA intentionally made "no argument" – either in the Administrative Record or in the court below – "that its transfer decision was not a 'discretionary' one within the meaning of 50 C.F.R. § 402.03." EPA App. 40a. Indeed, EPA expressly *disclaimed* any reliance on the regulation, and instead stressed to the court of appeals that "'EPA did consult,'" and hence the "'*only issue* before [that court] is the *adequacy* of that consultation.'" *Id.* at 43a n.19 (emphasis added) (quoting EPA CR 28(j) letter of July 27, 2005). Accordingly, once again, it would contravene fundamental administrative law precepts for this Court to sustain the transfer decision on the basis of the regulation.[14]

Finally, contrary to petitioners' contention, the ruling below in no way conflicts with *Dep't of Transportation v. Public Citizen*, 541 U.S. 752 (2004). *See* EPA Pet. at 12. The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), the statute at issue in *Public Citizen*, "imposes *only* procedural requirements on federal agencies with a particular focus on requiring agencies to undertake

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[14] If the Court were to consider the regulation, the ruling below explains how it can be read, as it must be, to be compatible with the plain language of Section 7(a)(2). *See* EPA App. 39a-42a. In addition, EPA clearly has at least some "discretionary ... involvement or control," both before and after NPDES transfer decisions are made. 50 C.F.R. § 402.03. As discussed previously, several of the CWA criteria require EPA, in deciding whether to transfer, to make discretionary determinations, including with regard to the adequacy of State programs to address wildlife impacts. *See supra* at 7. Moreover, as occurred in this case, EPA solicits public comment before deciding whether to transfer a State program; a federal agency does not solicit and consider public comment if those comments cannot inform some exercise of agency discretion. And, after a transfer is made, EPA exercises considerable oversight over the State's permitting actions. *See supra* at 8.

analyses of the environmental impact of their proposals and actions." 541 U.S. at 756-57 (emphasis added). Accordingly, if, as the Court ruled in *Public Citizen*, an agency "has no authority" to take environmental impacts into account in making a particular decision, then it "serve[s] 'no purpose' in light of NEPA's regulatory scheme as a whole" to require an agency to prepare an Environmental Impact Statement analyzing those impacts. *Id.* at 767 (internal citation omitted); *see also* EPA App. 89a-91a.

In contrast, by its plain terms and as construed in *Hill*, Section 7(a)(2) of the ESA is *not* a purely procedural requirement. Rather, it unmistakably imposes a substantive mandate on "[e]ach Federal agency" that takes "any action": the agency must "insure" that the action "is not likely to jeopardize the continued existence" of any listed species or "result in" the destruction of critical habitat. 16 U.S.C. § 1536(a)(2). Simply put, since the ESA prohibits EPA from making an NPDES transfer decision that would result in the extinction of listed species or the destruction of critical habitat – unless EPA obtains an exemption from the Endangered Species Committee – EPA is under the exact same obligation as the agency in *Hill* to both evaluate how species will in fact be affected by its decision, and to act (or refrain from acting) on the basis of that information.

CONCLUSION

The petitions should be denied.

Respectfully submitted.

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Nos. 06-340 & 06-549

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In The
Supreme Court of the United States

NATIONAL ASSOCIATION
OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

STATE OF ARIZONA'S REPLY BRIEF IN SUPPORT OF PETITIONERS

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ARGUMENT

I. The Court Should Not Remand This Case to the EPA Because Its Approval of Arizona's Pollution Permitting Program, Which Was Based on Arizona's Compliance with the Requirements of the Clean Water Act, Was Legally Correct.

Respondents argue that the Court must remand this case to EPA without addressing the statutory construction questions because EPA's decision was based on "inconsistent interpretations of Section 7(a)(2)" of the Endangered Species Act. (Brief for Respondents Defenders of Wildlife, et al. [Def. Br.] at 22.) But Respondents fail to acknowledge or even address Arizona's argument that this Court should affirm EPA's decision based on the correct interpretation of the Clean Water Act and the Endangered Species Act even if its interpretation is different from EPA's interpretation of the relevant statutes. Because EPA's interpretation of Section 7(a)(2), by Respondents' own terms, is an interpretation of a federal statute, this Court should determine the correct interpretation of Section 7(a)(2) instead of remanding.

To support their argument that the Court must remand to the EPA under "fundamental principles of administrative and appellate review," Respondents do not cite to any cases in which this Court has remanded a question concerning the appropriate interpretation of a federal statute to the administrative agency. (Def. Br. at 25.) Instead, Respondents rely on decisions that reiterate the non-controversial principle that the Court will remand to the administrative agency when the agency has not provided an adequate explanation for a decision that it alone is authorized to make. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)

(Because the Secretary of Transportation was required to issue motor vehicle safety standards and had rescinded crash protection requirements in its safety standards without offering any explanation, the Court vacated the rescission and remanded to the agency.); *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744 (1985) (In determining whether the court of appeals had original subject matter jurisdiction over the Nuclear Regulatory Commission's orders denying citizen petitions to modify, suspend, or revoke the license of a nuclear reactor, the Court reiterated that the agency record should enable the reviewing court to evaluate the basis for the agency decision.); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419 (1971), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977) (Court reversed the lower courts' ruling upholding the Secretary of Transportation's authorization of the expenditure of federal funds for the construction of an expressway through a public park because the record on review did not contain factual findings to support the Secretary's legally required determination that there was no feasible and prudent alternative route.); and *Am. Textile Mfrs. v. Donovan,* 452 U.S. 490, 539-40 (1981) (Court vacated and remanded the Occupational Safety and Health Administration's (OSHA's) promulgation of a wage guarantee requirement because OSHA failed to make the necessary determination or statement of reasons that the wage requirement was related to the achievement of health and safety goals.).

Here, EPA made the factual findings and determinations that were necessary for it to conclude that Arizona's pollution permitting (NPDES) program met the requirements of Section 402(b) of the Clean Water Act. (J.A. 237.) Respondents acknowledge that they never claimed that

Arizona's program did not meet the requirements of Section 402(b) of the Clean Water Act. (Def. Br. at 19 n.8.)[1] Because Respondents do not challenge EPA's factual findings or statement of its reasons that Arizona met the requirements of the Clean Water Act, the Court need not remand to EPA for clarification.

Respondents also argue that EPA's post hoc clarifications of its interpretation of Section 7(a)(2) cannot justify its approval of the Arizona pollution permitting program under the Clean Water Act. (Def. Br. at 24-25.) But EPA's clarification of its interpretation of a federal statute is not the kind of post hoc explanation that requires a remand.

In *Volpe*, the Court reversed the district court's summary judgment rejecting petitioners' claim that the Secretary of the Department of Transportation violated federal statutes when it authorized the expenditure of federal funds to construct an expressway through a public park without finding if there was a "feasible and prudent" alternative route. 401 U.S. at 405 & n.4 (quoting 49 U.S.C. § 1653(f) and 23 U.S.C. § 138). The Court found that the district court erred in relying on factual affidavits that the government respondents submitted in that court to support the Secretary's decision because the affidavits were "post hoc" rationalizations and did not constitute the whole

[1] Respondents point out that EPA has discretion under the Clean Water Act to "establish water quality standards that provide 'for the protection and propagation of fish, shellfish and wildlife.'" (Def. Br. at 7 [quoting 40 C.F.R. § 131.2].) However, EPA and the Fish & Wildlife Service (FWS) concluded that Arizona's Water Quality Standards would provide adequate protection to aquatic species and that oversight of the Arizona program would ensure that Arizona continued to meet Clean Water Act requirements, including those for the protection of fish, shellfish, and wildlife. (NAHB Pet. App. 615-16.)

record compiled by the agency. *Id.* at 419. In contrast, EPA's clarification of its interpretation of Section 7(a)(2) after the court of appeals issued its decision below is not EPA's attempt to provide factual findings or a statement of its reasons for approving Arizona's pollution permitting program – it is the agency's interpretation of a federal statute, which is readily subject to review by this Court.

Similarly, in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962), the Court rejected "appellate counsel's post hoc rationalizations for agency action" because it was an attempt to justify a decision that only the Interstate Commerce Commission was authorized to make, and the Commission had made no findings to support its decision. Unlike the situation in *Burlington*, EPA is not attempting to justify its approval of Arizona's pollution permitting program based on factual findings that are not part of the administrative record. Rather, it clarified its interpretation of Section 7(a)(2), which is a legal interpretation that this Court may review.

Respondents also argue that it is unfair to affirm EPA's decision based on its clarified interpretation of Section 7(a)(2) because they have "been severely prejudiced" by EPA's shifting, inconsistent positions concerning its Section 7(a)(2) responsibilities. (Def. Br. at 28.) However, after the court of appeals allowed Arizona and Petitioner National Association of Home Builders to intervene below, they squarely raised and briefed the legal issue of whether EPA was required to approve Arizona's application to administer the NPDES program because Arizona met the criteria for approval under Section 402(b) of the Clean Water Act. (Brief of Intervenor State of Arizona at 1, Nos. 03-71439 & 03-72894 (9th Cir. 2003)); Intervenors-Respondents Home Builders' Answering Brief

at 34, Nos. 03-71439 & 03-72894 (9th Cir. 2003)). And, Respondents fully addressed the issue. (Petitioners' Reply Brief at 25-29.) Therefore, Respondents cannot legitimately claim prejudice when they have been given the opportunity both in the court of appeals and this Court to address this legal argument.

Respondents also argue that the Court should remand to give the public the opportunity to comment on EPA's clarification of Section 7(a)(2)'s application to approvals of state NPDES programs. (Def. Br. at 28-29.) Although the public has the right to comment on an agency's promulgation, modification, or repeal of a rule (*see* 5 U.S.C. § 551(5)), "there is no barrier to an agency altering its initial interpretation [of a statute] to adopt another reasonable interpretation – even one that represents a new policy response generated by a different administration." *Paralyzed Veterans of Am. v. D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C. Cir. 1997) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 863 (1984)). Because EPA has not changed its interpretation of its rules, there is no need to remand for public comment.

Finally, Respondents argue that the Court should remand because they would have challenged EPA's decision to partially fund Arizona's NPDES program if they had known that EPA would take the position that Section 7(a)(2) did not apply to its decision to approve the program. (Def. Br. at 30.) This argument has no merit.

First, Respondents cannot blame their failure to raise all relevant issues below on EPA. As noted above, Arizona and National Association of Home Builders put Respondents on notice of their interpretation of Section 7(a)(2). Moreover, FWS's Biological Opinion put Respondents on

notice that FWS believed that the Clean Water Act granted States the right to administer NPDES programs even if such approval would result in a loss of conservation benefits. (NAHB Pet. App. 114.)[2]

Second, once EPA determined that it would approve Arizona's program because it met Section 402(b)'s requirements, its additional decision to provide funding would not require consultation under Section 7(a)(2). Such consultation is triggered by the requirement that EPA "insure" that "any action" that it "fund[s]" is "not likely to jeopardize" any endangered or threatened species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). Although increased construction may affect terrestrial upland species, the action funded – the Arizona NPDES program – is not likely to jeopardize any endangered or threatened species or adversely modify critical habitat. (*See* NAHB Br. at 45-46 and the Brief of Amici Curiae High Production Homebuilders in Support of Petitioners for an in-depth discussion of when agency action triggers Section 7 consultation.)

In sum, the Court should not remand this matter to EPA because any inconsistencies in EPA's decisionmaking involve the interpretation of federal statutes and are therefore appropriate for this Court's review. And, this Court's guidance on this important question is necessary to resolve the conflict between the circuit courts.

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[2] In its Biological Opinion, the FWS stated: "Further, loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." *Id.*

II. Section 7(a)(2) Does Not Apply to EPA's Decision to Transfer Pollution Permitting Authority to Arizona.

Respondents selectively focus on language, legislative history, and decisional authority that seemingly supports their argument that Section 7(a)(2) applies to EPA's decision to transfer pollution permitting authority to Arizona under Section 402(b) of the Clean Water Act. But Respondents simply ignore statutory language, legislative history, and decisional authority that show that Congress intended the transfer provisions of Section 402(b) to be mandatory and did not intend to expand agencies' authorities when it enacted the Endangered Species Act. Respondents' construction of Section 7(a)(2) is wrong because it is contrary to Congress's intent.

A. Because the Language of Section 7(a)(2) Is Susceptible to Different Interpretations, the Court Should Look to Its Legislative History to Determine Congress's Intent.

Respondents argue that the plain language of Section 7(a)(2) and its relationship to Section 7(a)(1) show that it applies to nondiscretionary agency actions. (Def. Br. at 34-35.) But Respondents ignore Section 7(a)'s legislative history that is contrary to their argument. Because the language of Section 7(a)(2) is susceptible to different interpretations, the Court should examine its legislative history to ascertain Congress's intent and defer to the reasonable interpretation of the agency responsible for enforcing the statute.

The EPA acknowledges that it stated that it was required to consult under Section 7(a)(2) before approving

Arizona's application to administer the NPDES program in the administrative proceeding below. (EPA Br. at 45.) EPA also acknowledges that its characterization of Section 7(a)(2) is "not consistent with the relevant federal agencies' understanding of Section 7(a)(2) as reflected in the FWS/NMFS regulations . . . and in more recent agency pronouncements." (EPA Br. at 45.) That EPA's history of interpreting Section 7(a)(2) reflects two different interpretations does not show a disingenuous litigation strategy, as suggested by Respondents; rather it shows that the language of Section 7(a)(2) is susceptible to more than one interpretation.

Given the ambiguity in Section 7(a)(2)'s language, the Court must ascertain if the interpretation of the agency responsible for enforcing the statute is contrary to congressional intent as determined by traditional rules of statutory construction. *Chevron,* 467 U.S. at 843 & n.9. Instead of recognizing this and addressing the portion of Section 7(a)'s legislative history that is discussed in Petitioners and Arizona's briefs, Respondents ignore it.[3]

The legislative history of Section 7(a) shows that Congress intended the phrase "utilize their authorities" to modify both the requirement that is now contained in Section 7(a)(1) and the requirement that is now contained in Section 7(a)(2) and that Congress intended no substantive change when it later separated the requirements into two subsections. (*See* Ariz. Br. at 14-16; EPA Br. at 29-34; NAHB Br. at 35-37.) Thus, the legislative history does not

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[3] Respondents argue that the 1978 amendments to Section 7(a)(2) support their interpretation of Section 7(a)(2) because Congress ratified this Court's interpretation of Section 7(a)(2) in *TVA v. Hill,* 437 U.S. 153 (1978). This argument fails because *TVA v. Hill* does not support Respondents' interpretation. *See* argument in Section II(B) *infra.*

support Respondents' argument that the limitation in Section 7(a)(1) that agencies "utilize their authorities" indicates that Congress did not intend to similarly limit the agencies' responsibility under Section 7(a)(2). Instead, the legislative history supports FWS's regulation that construes Section 7(a)(2) to apply only to discretionary agency actions. *See* 50 C.F.R. § 402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.").

Respondents argue that the Court should not defer to FWS's interpretation of the scope of Section 7(a)(2), even though it is the agency responsible for enforcing the Endangered Species Act, because EPA did not rely on it in the Ninth Circuit. (Def. Br. at 45.) However, Arizona relied on 50 C.F.R. § 402.03 in arguing that Section 7(a)(2) did not apply to EPA's approval of Arizona's NPDES program because EPA lacked discretion to deny approval if Arizona met the requirements of Section 402(b). (Brief of Intervenor State of Arizona at 14-16, Nos. 03-71439 & 03-72894 (9th Cir. 2003)). And, the court of appeals addressed the argument. (NAHB Pet. App. at 39-41.) Because the enforcing agencies' regulation, 50 C.F.R. § 402.03, is a reasonable interpretation of Section 7(a)(2) that is consistent with Congress's intent, the Court should defer to it. *Chevron*, 467 U.S. at 844.

B. This Court's Decision in *TVA v. Hill* Does Not Support Respondents' Construction of Section 7(a)(2).

Respondents also argue that *TVA v. Hill,* 437 U.S. 153 (1978), supports their expansive interpretation of Section 7(a)(2). (Def. Br. at 38-39.) But Respondents fail to address the significant distinctions between this case and *Hill.* Those distinctions are fatal to Respondents' argument.

First, *Hill* involved TVA's discretionary action. The Court found that the lump-sum congressional appropriations to TVA did not require TVA to complete the Tellico Dam even though its completion would violate Section 7 of the Endangered Species Act. 437 U.S. at 189-93. Second, *Hill* construed the language of Section 7 as it was originally enacted in 1973, *id.* at 160, and thus addresses whether a federal agency must comply with Section 7 when it is acting within its existing authority, *id.* at 164 n.14. Therefore, *Hill* does not support Respondents' argument.

CONCLUSION

This Court should vacate the judgment of the court of appeals and uphold EPA's approval of the Arizona's pollution permitting program.

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Respectfully submitted,

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In the Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
PETITIONERS

v.

DEFENDERS OF WILDLIFE, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER ENVIRONMENTAL PROTECTION AGENCY

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v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER ENVIRONMENTAL PROTECTION AGENCY

A. The Court Of Appeals' Decision Is Erroneous

Our opening brief explains (at 17-29) that Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2), construed in accordance with established principles of legal causation, applies only to discretionary agency conduct. Section 7(a)(2) therefore does not supersede the requirement of Section 402(b) of the Federal Water Pollution

Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1342(b), that the Environmental Protection Agency (EPA) "shall approve" a State's application for transfer of National Pollutant Discharge Elimination System (NPDES) permitting authority when specified criteria concerning the State's legal authority to administer the NPDES program are satisfied. Section 402(b) specifies nine criteria that a State must satisfy before EPA *shall* transfer authority to the State. The ESA should not—and need not—be read as adding a tenth criterion to the State's burden. Our opening brief further explains (at 29-38) that the language of Section 7 of the ESA as originally enacted in 1973, and the circumstances under which Section 7 was amended to its current form in 1978 and 1979, reinforce the conclusion that Section 7(a)(2) is limited to an agency's discretionary decisions in utilizing its authorities and does not supersede mandatory statutory duties. Respondents fail to refute those arguments.

1. The responsible federal agencies' interpretation of Section 7(a)(2) of the ESA is consistent with the statutory text and structure

a. Section 7(a)(2) of the ESA requires EPA to "insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Respondents contend (Br. 34) that the position taken by the responsible federal agencies in this case is inconsistent with the "plain language" of Section 7(a)(2). That is incorrect.

Respondents argue (Br. 34) that the approval of Arizona's application for transfer of NPDES permitting authority falls within Section 7(a)(2)'s definition of "agency action" as an action "authorized" by EPA. It is far more natural, however,

to say that the transfer was "authorized" (indeed mandated) *by Congress*, which directed that state applications "shall" be approved if they satisfy the CWA criteria (see 33 U.S.C. 1342(b)), rather than by EPA, which simply obeyed that statutory mandate. Cf. 06-549 Pet. App. 65a (Thompson, J., dissenting); Gov't Br. 25 n.7. That reading of the term "authorized" is consonant with the general thrust of Section 7(a)(2), which imposes no overarching duty on federal agencies to protect listed species from harms caused by other actors, but focuses on impacts attributable to the agency itself. See *id.* at 22 & n.6.

Even if the approval of Arizona's transfer application were properly regarded as a federal "agency action" within the meaning of Section 7(a)(2), established principles of legal causation make clear that the approval did not "jeopardize" any listed species. Our opening brief explains (at 21, 25), and respondents do not dispute, that the word "jeopardize" in Section 7(a)(2) means "cause jeopardy to." That phrase logically suggests a requirement of proximate or legally relevant cause. Because the CWA required EPA to approve Arizona's transfer application once it determined that the CWA criteria were satisfied, Congress's action, not EPA's, was the "legally relevant cause" of any harm to listed species that might occur after the transfer. See *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 769 (2004). EPA's approval therefore did not "jeopardize" the continued existence of any such species.

Respondents contend (Br. 48-49) that *Public Citizen* is inapposite here because that case involved a statute (the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*) that imposes solely procedural requirements upon federal agencies. Respondents are correct that the substantive no-jeopardy mandate imposed by Section 7(a)(2) of the ESA has no analog in NEPA. The Court in *Public Citizen*, however, did not limit its causation analysis to purely

procedural laws, but held more generally that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. That holding logically requires the conclusion under the ESA that conduct mandated by another federal statute cannot "jeopardize" a listed species. Cf. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-697 n.9 (1995) (holding that "ordinary requirements of proximate causation and foreseeability" govern the application of the ESA's prohibition of "take[s]" of listed species, see 16 U.S.C. 1538(a)).[1]

The conclusion that follows from the statutory text—that Section 7 of the ESA does not supersede the mandatory and exclusive directive contained in Section 402(b) of the CWA—is reinforced by the settled principle that "repeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (citations and internal quotation marks omitted); see Gov't Br. 19-21. That "principle carries special weight when [the Court is] urged to find that a specific statute has been repealed by a general one." *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976). The carefully tailored CWA provisions at issue here, which speak precisely to the transfer of NPDES permitting authority and reflect

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[1] Amici American Bird Conservancy, et al., contend (Br. 28-30) that, if the Section 7 consultation process is inapplicable to agency conduct that is required by another Act of Congress, federal officials who implement the pertinent statutory directive may be liable for any resulting "take[s]" of listed species in violation of Section 9 of the ESA, 16 U.S.C. 1538. That concern is unwarranted. Because (as explained in the text) the "take" prohibition itself is properly construed to incorporate established causation principles, federal officials would not be liable for any takes that might result from their compliance with other Acts of Congress. See *Bennett* v. *Spear*, 520 U.S. 154, 173-174 (1997).

sensitivity to the federalism concerns that the allocation of such power entails, are clearly more specific to the instant circumstances than is the general no-jeopardy provision applicable to all federal agencies under Section 7(a)(2) of the ESA.

Congress, having specified nine criteria relevant to the specific transfer of authority, should not lightly be construed to have added a tenth when it enacted the ESA. And, given the federalism-sensitive nature of the CWA provisions governing transfer of NPDES permitting authority, it would be especially anomalous to add as a tenth criterion a requirement that state permitting officials be effectively made subject to the no-jeopardy duty in Section 7(a)(2) of the ESA—a provision that Congress carefully limited to agencies of the federal government. Indeed, even if the relevant provisions of the ESA and CWA were irreconcilably in conflict, respondents are incorrect in stating (Br. 45 n.16) that the ESA would control as the later-enacted statute. To the contrary, "it is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961) (quoting *Townsend* v. *Little*, 109 U.S. 504, 512 (1883)); see Gov't Br. 18-19.

b. Section 7(a)(1) of the ESA directs federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1). Respondents contend (Br. 37-38) that "the section 7(a)(1) duty to 'conserve' listed species necessarily *subsumes*" Section 7(a)(2)'s no-jeopardy mandate, and that the latter requirement will therefore be rendered "surplusage" unless Section 7(a)(2), unlike Section 7(a)(1), is read to encompass conduct in which a federal agency is legally required to engage. That argument lacks merit.[2]

[2] Respondents also attach significance (see Br. 36-37) to the fact that Section 7(a)(1) contains the phrase "utilize their authorities" and Sec-

Respondents are correct that the "conservation" requirement imposed by Section 7(a)(1) extends beyond the duty not to "jeopardize" the continued existence of a listed species. See 16 U.S.C. 1532(3) ("The terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary."). And the former requirement does "subsume" the latter—in the sense that avoiding "jeopard[y]" to listed species as required by Section 7(a)(2) is one way for agencies to "utilize their authorities" to further the purposes of the Act. See Gov't Br. 32. But the key to reconciling the provisions lies not in expanding Section 7(a)(2) to encompass statutory mandates, but in recognizing that the obligations attach at different levels of agency action.

Section 7(a)(1) imposes only a general programmatic obligation: it directs each federal agency to make *some* meaningful effort to conserve listed species, but it does not require that *every* action by the agency achieve a conservation purpose. See *Protect Our Water* v. *Flowers*, 377 F. Supp. 2d 844, 870 (E.D. Cal. 2004) ("By its terms, section 7(a)(1) applies to agency programs, not individual agency actions."). Section 7(a)(2)'s no-jeopardy mandate, by contrast, applies to every individual action that is properly attributed to a federal agency under the causation principles discussed above. An agency could comply with its generalized obligations under Section 7(a)(1) even if a particular action would run afoul of Section 7(a)(2). Thus, Section 7(a)(2) imposes a significant obligation that Section 7(a)(1) does not, even though neither provision overrides mandates or constraints placed on agency discretion by other Acts of Congress.

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tion 7(a)(2) does not. We address that point at pp. 12-15, *infra*.

c. Contrary to respondents' contention (Br. 41-43), the inclusion of an exemption procedure in Section 7 does not suggest that the requirements of Section 7(a)(2) apply even where an agency is acting pursuant to an express statutory directive. An applicant for an exemption must show, *inter alia*, that it has "carried out [its] consultation responsibilities * * * in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section." 16 U.S.C. 1536(g)(3)(A)(i). The statutory provisions governing the consultation process make clear, however, that the "reasonable and prudent alternatives" presented for the agency's consideration must be measures that "can be taken by the Federal agency." 16 U.S.C. 1536(b)(3)(A). Such measures would not include an alternative course of conduct that is forbidden by federal law. See 50 C.F.R. 402.02 (defining "reasonable and prudent alternatives" to mean measures "that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction"). Thus, under respondents' position, an applicant for an exemption under Section 7(g) of the ESA, 16 U.S.C. 1536(g), must exhaust a consultation process that is unsuited to situations in which the agency action is mandated by another Act of Congress. Far from supporting respondents' position, the ESA's exemption provisions reinforce the conclusion that Section 7(a)(2) is simply inapplicable to agency conduct that is required by another Act of Congress.

d. Respondents contend (Br. 44) that, because the CWA and ESA serve complementary objectives, EPA should have "use[d] the section 7 consultation process to devise reasonable methods for ameliorating post-transfer impacts on federally listed species." It is true that, under some circumstances, EPA's application of the CWA criteria governing state trans-

fer applications (*e.g.*, the requirement that the State demonstrate its authority to issue permits that ensure compliance with applicable water quality standards, see 33 U.S.C. 1311(b)(1)(C), 1342(b)(1)(A) (incorporating 33 U.S.C. 1311)) may incidentally benefit species listed pursuant to the ESA. And if a person believed that the responsible state agency would lack the authority under state law to administer such standards effectively, the person could seek judicial review of the transfer decision on that ground. The dispositive question in such a case, however, would be whether EPA, in granting the State's application, had arbitrarily determined that the *CWA* criteria were satisfied—not whether the approval satisfied distinct requirements purportedly imposed by the ESA.[3]

No issue of CWA compliance is raised in the instant case because it is undisputed that Arizona's transfer application satisfied the prerequisites established by that statute. See 06-549 Pet. App. 31a n.11; Gov't Br. 18; Resp. Br. 19 n.8. The CWA's directive that EPA "shall approve" a conforming application, 33 U.S.C. 1342(b), is therefore controlling. The generally complementary purposes of the ESA and CWA pro-

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[3] In acting on a State's application for transfer of NPDES permitting authority, EPA considers, *inter alia*, whether the State possesses the legal authority and resources to enforce applicable water quality standards. See 33 U.S.C. 1342(b)(1)(A) (referring to 33 U.S.C. 1311); 33 U.S.C. 1314(i); 40 C.F.R. 123.27. EPA's evaluation of the transfer application, however, does not require scrutiny of the water quality standards themselves, which EPA approves through a separate process under 33 U.S.C. 1313(c). Under that separate process, when a State requests approval of new or revised water quality standards, EPA consults with the Fish and Wildlife Service and/or the National Marine Fisheries Service concerning that request if it determines that the proposed standards may affect species listed under the ESA. See 06-340 Pet. App. 263-264.

vides no basis for EPA to countermand that unambiguous statutory command.[4]

e. A regulation adopted jointly by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) in 1986 states that "Section 7 and the requirements of [50 C.F.R. Pt. 402] apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. 402.03 (emphasis added). Respondents contend (Br. 46-47) that, because application of the CWA criteria requires some exercise of judgment, EPA's transfer decision is subject to "discretionary Federal involvement or control" within the meaning of the regulation. That argument lacks merit. Although EPA's evaluation of the CWA factors is not a purely mechanical inquiry, EPA lacks discretion to look beyond those factors or to deny a State's application where (as here) the CWA criteria are satisfied. To the extent that 50 C.F.R. 402.03 is otherwise ambiguous, FWS and NMFS have recently confirmed that they construe the regulatory phrase "discretionary Federal involvement or control" not to encom-

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[4] Respondents suggest (Br. 29-30) that EPA's decision to fund Arizona's program implicated Section 7(a)(2) even if the approval of the transfer application, standing alone, did not. EPA's provision of grant money to state water-pollution-control programs, however, is independent of the decision whether to transfer NPDES permitting authority to state officials and is governed by different regulatory criteria. Compare 40 C.F.R. 35.162(b)(1)(i) (criteria governing EPA funding for state programs do not include prior approval of NPDES transfer application for the relevant State), with 40 C.F.R. 123 (EPA regulation governing state NPDES programs). Indeed, we are informed that Arizona had received EPA funding for water-pollution-control efforts for some years before its NPDES transfer application was granted. Respondents have not separately challenged EPA's funding decision, and any effort to contest the provision of federal money to the State would raise difficult questions of causation and redressability that the court below had no occasion to address. EPA's decision to approve the transfer therefore is the sole focus of judicial review in this case.

pass EPA's authority to grant or deny a State's NPDES transfer application. See 06-549 Pet. App. 109a-110a, 114a-115a; Gov't Br. 14, 37.[5]

Respondents also contend (Br. 45-46) that this Court should not consider 50 C.F.R. 402.03 because the agencies did not invoke the regulation during the administrative proceedings in this case. The private intervenors (petitioners in No. 06-340) relied on the regulation, however, and the court of appeals announced its own construction of the rule. See Gov't Br. 38 n.13. In any event, the legal-causation rationale set forth in the FWS biological opinion (BiOp), which also is embodied in the definition of "effects of the action" in 50 C.F.R. 402.02 (see Gov't Br. 5-6), and the requirement of "discretionary Federal involvement or control" in 50 C.F.R. 402.03, are simply different ways of expressing the same principle—*i.e.*, that an agency can "jeopardize" listed species only through conduct in which it *chooses* to engage.[6]

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[5] Amici American Bird Conservancy, et al., construe 50 C.F.R. 402.03 to mean no more than that "Section 7(a)(2) applies broadly to all yet-to-be completed federal actions," as distinct from actions in which prior federal involvement has terminated. Br. 13; see Br. 9-13. Like the court of appeals' construction of Section 402.03, however, the interpretation proffered by amici reads the word "discretionary" out of the rule. Cf. Gov't Br. 36-37. Certainly an activity in which the federal role has concluded would be *one* example of an action lacking "discretionary Federal involvement or control." In addition, however, the regulation is naturally read to exclude activities in which a federal agency continues to participate if the terms of its involvement are dictated by Congress.

[6] Noting that "EPA's transfer decision * * * triggers a continuing duty on it to oversee the administration of the state program," amici American Bird Conservancy, et al., argue (at 25) that "[c]onsultation between EPA and [FWS or NMFS] at the time of transfer can and should explore how EPA will exercise its oversight and permit objection authorities." Although EPA, in the course of its discretionary oversight, may in some circumstances issue an NPDES permit in a State

2. *Respondents' reliance on* TVA *v.* Hill *is misplaced*

Contrary to respondents' contention (Br. 38-41), this Court in *TVA* v. *Hill*, 437 U.S. 153 (1978), did not suggest that the ESA's no-jeopardy requirement overrides constraints or mandates contained in other Acts of Congress. The government's principal contention in *Hill* was that the ESA did not prohibit completion of the Tellico Dam because that project had been planned and largely finished before the ESA's enactment in 1973 and the listing of the snail darter as an endangered species in 1975. See Gov't Br. at 19-21, 23-34, *Hill*, *supra* (No. 76-1701). This Court's rejection of that retroactivity argument, see 437 U.S. at 173-174, 184-188, has no bearing on the question presented here.

The government in *Hill* also argued (see Br. 21-23, 34-46) that federal appropriations laws enacted during the pendency of the snail-darter controversy reflected Congress's intent that the Tellico Dam should go forward. In rejecting that contention, the Court did not hold (as respondents' position here would suggest) that Section 7 of the ESA would have prohibited completion of the dam even if the appropriations Acts had expressly required that result. Rather, the Court explained that the relevant Acts had appropriated lump-sum amounts for the agency but had not specified the uses to which the money would be put. See 437 U.S. at 189 & n.35. While acknowledging that the pertinent House and Senate Reports had expressed a preference for the dam's completion,

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with an authorized program (see 33 U.S.C. 1342(d)(4)), that does not mean that the transfer decision is itself discretionary. And the possibility that EPA may some day take an action for which it would be required to consult in exercising its discretionary oversight of Arizona's program (*e.g.*, when issuing an NPDES permit that may affect a listed species) provides no basis for setting aside a transfer approval that the CWA *required* EPA to issue.

see *id.* at 189, the Court observed that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress," *id.* at 191. The clear implication of the Court's decision was that Section 7 of the ESA would not preclude an agency from taking action that—like the transfer of NPDES permitting authority at issue here—*is* expressly required by another federal statute. The Court's observation that those expressions emanated from committee reports rather than from the statute would have been irrelevant if Section 7 had the extraordinary scope respondents attribute to it.[7]

3. Respondents' position is inconsistent with the development of Section 7 of the ESA since its original enactment

Our opening brief explains (at 29-30) that, under Section 7 of the ESA as originally enacted in 1973, the obligations of

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[7] Respondents contend (Br. 39 n.14) that *Hill* was like this case because the TVA had no discretion to decline to spend the funds appropriated for the Tellico Dam. As a legal matter, however, lump-sum appropriations leave the ultimate expenditure of the amounts appropriated to the discretion of the agency. See *Lincoln* v. *Vigil*, 508 U.S. 182, 192-193 (1993); see also *Clinton* v. *City of New York*, 524 U.S. 417, 446, 448 n.43 (1998). By contrast, *Train* v. *City of New York*, 420 U.S. 35, 43-48 (1975), upon which respondents rely, involved, not a lump-sum appropriation, but a statute the Court construed to *require* the allocation of the funds. Moreover, even assuming, arguendo, that the TVA was obligated to spend the entirety of the appropriations, nothing in the text of the relevant Acts required the agency to spend money *on the Tellico Dam*. While the government did contend in *Hill* that Congress's intent to constrain the TVA's discretion was fairly discernible from the legislative history of the pertinent appropriations Acts, the Court's holding there that the statutes themselves did not impose any such obligation does not cast doubt on EPA's view of its current responsibilities under the CWA, which rests squarely on the text of the enacted law.

federal agencies to carry out conservation programs (now contained in Section 7(a)(1)) and to avoid jeopardy (now contained in Section 7(a)(2)) were *both* directed towards the agency's existing powers by the phrase "utilize their authorities." Our opening brief further explains (at 31-33) that the circumstances under which Section 7 was amended in 1978 and 1979 belie any possible inference that Congress, by omitting the phrase "utilize their authorities" from current Section 7(a)(2), intended to expand the coverage of the ESA's no-jeopardy requirement. Respondents appear to recognize (see Br. 35-37) that the phrase "utilize their authorities" in Section 7(a)(1) reflects Congress's intent that agencies should conserve listed species only to the extent that they are permitted to do so under other provisions of law. Respondents entirely fail, however, to address the implications of that point for the proper interpretation of Section 7(a)(2).

a. Relying on the 1973 legislative history, respondents contend that the enacting Congress viewed the prohibition against jeopardy as imposing a further duty that "goes beyond" Section 7's conservation requirement, and that Congress used the phrase "utilize their authorities" selectively in order to distinguish between the two. See Resp. Br. 37 n.13. Because the conservation requirement is a generalized programmatic obligation, while the no-jeopardy requirement applies to *every* action properly attributable to a federal agency, the latter duty is a particularized aspect of the former, not a wholly distinct requirement, as respondents contend. See pp. 5-7, *supra*. Moreover, the 1973 legislative history is a most implausible source for an explanation for Congress's selective use of the phrase "utilize their authorities" because *both* duties were qualified by the phrase "utilize their authorities" under Section 7 as originally enacted in 1973.

b. Respondents contend (Br. 41-43) that, in amending Section 7 of the ESA in 1978, Congress intended generally to

ratify this Court's decision in *Hill* while giving federal agencies the possibility of some relief from Section 7's no-jeopardy requirement through the creation of the Endangered Species Committee. Respondents further assert (Br. 42) that, "rather than respond to *Hill* by qualifying the jeopardy prohibition with the kind of limiting language in section 7(a)(1), Congress reenacted the prohibition without any such restriction." But the no-jeopardy requirement was *already* qualified by the phrase "utilize their authorities."[8] There was accordingly no need for Congress to change the statute (or to overrule or modify *Hill*) in order to provide that the jeopardy prohibition applies only to matters within federal agencies' existing authority. Moreover, even respondents do not suggest that Congress "responded" to *Hill* by expanding the no-jeopardy provision to encompass agency actions directly mandated by Congress. Thus, given that Section 7 of the pre-1978 ESA expressly tied the no-jeopardy mandate to the "utilize their authorities" language, respondents' apparent recognition that the 1978 Congress was content with the existing scope of the no-jeopardy requirement cuts against rather than in favor of their position.

c. While arguing that current Section 7(a)(2) unambiguously covers agency conduct mandated by another Act of Congress, respondents do not make clear *when* they believe the ESA's no-jeopardy requirement came to have that broad scope. Any contention that Section 7 of the 1973 law had that

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[8] The Court in *Hill* was fully aware of this fact, as evidenced by the reproduction of the full text of Section 7 in its opinion (see 437 U.S. at 160), by its quotation of the statement by Representative Dingell that Section 7 requires agencies to take steps "within their power" to carry out the purposes of the Act (*id.* at 183 (quoting 119 Cong. Rec. 42,913 (1973))), and by the fact that the only references to agency practices that would be altered by Section 7 were to conduct within the agencies' discretionary authority (*id.* at 183-184, 185-186 n.31, 186-187).

coverage would be inconsistent with the fact that the no-jeopardy requirement was qualified at that time by the phrase "utilize their authorities"—language that respondents themselves agree reflects Congress's intent that federal agencies pursue the ESA's objectives only to the extent permitted by other provisions of law. But any suggestion that the coverage of the no-jeopardy requirement was broadened by the 1978 (or 1979) ESA amendments is both implausible on its own terms (see Gov't Br. 31-34) and inconsistent with respondents' assertion that Congress ratified the decision in *Hill*.

B. A Remand For Further Administrative Proceedings Is Unwarranted

Respondents contend (Br. 22-32) that this case should be remanded for further agency proceedings. That disposition is unwarranted. As our opening brief explains (at 9, 43), the FWS BiOp, on which EPA relied in its final decision, set forth a legally sufficient rationale for FWS's ultimate no-jeopardy conclusion. The BiOp found that any harm to listed species that might occur after the transfer of permitting authority "is not caused by EPA's decision to approve the State of Arizona's program," but instead "reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." 06-340 Pet. App. 114. That rationale, endorsed by EPA (see *id.* at 564, 565), was sufficiently clear to permit judicial review and was fully consistent with governing legal principles. See Gov't Br. 46-47. In addition, EPA, FWS, and NMFS have recently confirmed their shared view that Section 7(a)(2) of the ESA neither requires nor authorizes EPA to deny a State's application for transfer of NPDES permitting authority if the CWA criteria are satisfied. See *id.* at 13-14, 37-38, 48-49; 06-549 Pet. App. 93a-116a. Under these circumstances, a remand for

further administrative proceedings would serve no useful purpose.

1. Respondents suggest (Br. 22-23) that the government has acquiesced in the court of appeals' holding that internal inconsistencies in EPA's reasoning rendered the agency's final decision arbitrary and capricious. Respondents misapprehend the point made in the government's opening brief. EPA failed to appreciate during the administrative proceedings that, because the consultation requirement in Section 7(a)(2) is ancillary to and in aid of the no-jeopardy requirement, EPA was not obligated to consult with FWS concerning the effects on listed species of an administrative decision that was compelled by the CWA. EPA's failure to follow the implications of the CWA's mandatory language to their full logical conclusion did not render its approval of the transfer application arbitrary and capricious, however, because the agency's failure to take that further step neither influenced the approval decision nor obscured the agency's basic rationale. See Gov't Br. 44-48.[9]

2. Respondents contend (Br. 17-18, 24 n.9) that EPA's decision was arbitrary and capricious because the FWS BiOp's legal-causation rationale was inconsistent with the BiOp's statement that "[r]egarding causation, the FWS uses the 'but for' test." 06-340 Pet. App. 112. That is incorrect. FWS's analyses of "but for" and legal causation reflect *alter-*

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[9] Respondents state (Br. 23) that "EPA goes so far as to characterize its own decision documents as being based on a 'misstatement of law.'" EPA's final decision document (the *Federal Register* notice that announced the agency's approval of Arizona's transfer application) did *contain* a misstatement of law, to the effect that the consultation process was "required by ESA section 7(a)(2)." 06-340 Pet. App. 73. Respondents' assertion that the decision documents were "based on" that misstatement, however, implies that EPA's final decision would or might have been different if the agency had recognized that consultation was not required. That is plainly not the case. See Gov't Br. 45-46.

native rather than inconsistent grounds for the BiOp's conclusion that approval of the State's transfer application would not be likely to "jeopardize" any listed species.

FWS applied a "but for" causation test in determining whether anticipated future development in Arizona should be treated, as a factual matter, as a consequence of the proposed transfer of permitting authority. FWS concluded that, "[w]hile development may be reasonably certain to occur in the future, EPA's approval action will not cause development." 06-340 Pet. App. 113. The BiOp explained that "[d]evelopments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability." *Ibid.* FWS further observed that approval of Arizona's application would "not provide an incentive to develop in the action area, as would a new highway or water line." *Ibid.*

That practical analysis is in no way inconsistent with FWS's *legal* conclusion that any loss of conservation benefit under Section 7 that would occur after the transfer is properly attributed to Congress rather than to EPA. See 06-340 Pet. App. 114. Nor was it inappropriate for FWS to analyze both types of causation in the same BiOp. In stating that "a 'but for' causal relationship is *insufficient* to make an agency responsible for a particular effect under NEPA," *Public Citizen*, 541 U.S. at 767 (emphasis added), this Court did not suggest that "but for" causation is *irrelevant* to NEPA analysis. Similarly under the ESA, the determination whether particular agency conduct is likely to "jeopardize" listed species may entail analysis of both the likely practical consequences of that conduct and whether the agency has the legal authority to alter its behavior.

Even though the legal-causation analysis in this case would have provided an independently sufficient justification for the BiOp's no-jeopardy finding, thus rendering the "but

for" causation analysis unnecessary, FWS cannot be faulted for taking a belt-and-suspenders approach. Thus, if the legal-causation rationale for the no-jeopardy determination in this case is otherwise sound, FWS's additional finding that development levels in Arizona would not likely be affected by a transfer of NPDES permitting authority cannot render EPA's approval decision arbitrary and capricious. The fact that the FWS BiOp analyzed concepts of both "but for" and legal causation therefore provides no basis for setting aside the challenged agency action.

3. Respondents contend that, by endorsing the legal-causation analysis described above after previously stating that it was required to consult on the transfer decision, "EPA is effectively nullifying respondents' rights to participate in administrative proceedings concerning Arizona's application, and particularly respondents' rights under EPA's own regulations to comment on NPDES transfer applications." Resp. Br. 28 (emphasis omitted; citing 40 C.F.R. 123.61(b)). That claim lacks merit. Neither the cited regulation nor background principles of administrative law suggest that the right to comment on proposed agency action includes a right to advance notice of all material aspects of the agency's ultimate chain of reasoning. Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (explaining that longstanding precedents of this Court "make plain that [an administrative agency] is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion").

With respect to NPDES transfer decisions in particular, EPA's regulations establish "a comment period of not less than 45 days during which interested members of the public may express their views on the State program." 40 C.F.R. 123.61(a)(1). In this case, members of the public were af-

forded the opportunity to comment (both on endangered-species issues and on all other aspects of Arizona's application) that the regulation contemplates. EPA voluntarily forwarded to FWS all ESA-related comments that it received, see J.A. 229, and it responded to the public comments when it issued its final decision, see J.A. 223-247. Respondents therefore suffered no diminution of their right to participate in the administrative proceedings.

4. Our opening brief explains (at 48-49) that, whether or not a remand for further administrative proceedings would have been appropriate at an earlier stage of this case, it is unwarranted now because the agencies' recent exchange of letters (see 06-549 Pet. App. 93a-116a) has already provided the sort of clarification that a remand might have produced. Respondents contend (Br. 24-27) that this Court cannot consider those materials because they postdate the agency decision under review. That claim lacks merit.

The principle of law on which the government relies in this Court—*i.e.*, that a federal agency cannot properly be regarded as the legal cause of effects that it lacks the legal authority to prevent—is not a "*post hoc* explanation" (Resp. Br. 24) for an agency decision that was initially based on other grounds. To the contrary, the BiOp itself stated that "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program" but instead "reflects Congress' decision to grant States the right to administer these programs" if the CWA criteria are satisfied. 06-340 Pet. App. 114.[10]

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[10] In so concluding, FWS endorsed the view of the pertinent EPA regional office that its approval of the State's application was "not the cause of future non-discharge-related impacts on endangered species

The court of appeals appeared to recognize that FWS's no-jeopardy finding, and EPA's subsequent approval of the State's transfer application, were based in substantial part on the legal-causation rationale described above. See 06-549 Pet. App. 25a. The court viewed the agencies' commitment to that causation analysis as suspect, however, because the agencies had declined to endorse the corollary proposition that the consultation need not have occurred at all. See *id.* at 25a-26a. The agencies' recent exchange of letters in connection with Alaska's application reflects a shared understanding that consultation is not legally required in this context. See *id.* at 96a, 107a, 116a; Gov't Br. 48-49. In issuing that further clarification of their legal position, the agencies did not set forth a new rationale for the prior no-jeopardy determination in this case.[11]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007

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from projects requiring State NPDES permits" because, *inter alia*, "section 402(b) of the CWA states that EPA 'shall' approve the State program if it meets certain specified criteria." 06-340 Pet. App. 564, 565.

[11] Our opening brief states (at 7 n.1) that "[t]he Pima pineapple cactus is currently being reviewed to determine whether it is a valid taxonomic entity." We are informed that FWS has now completed its review and has concluded that no change in the listing status of the Pima pineapple cactus is warranted.

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Nos. 06-340 and 06-549

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In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF OF PETITIONERS NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*

Petitioners Home Builders submit their reply brief and, for the reasons set forth below and those stated in Home Builders' opening brief, the judgment of the court of appeals should be reversed.[1]

A. Remand To EPA Is Unnecessary Because This Case Turns On The Interpretation Of Federal Statutes, And No Facts Are In Dispute.

As explained below and in Home Builders' opening brief (HB Br. 25-27), under the plain language of CWA Section 402(b) and EPA's implementing regulations, EPA must approve a State's NPDES program if the program satisfies the nine statutory criteria, in accordance with Congress' express policy "that the States manage" the NPDES program. 33 U.S.C. § 1251(b). Given that this statutory mandate is clear and unambiguous, this Court can decide, as a matter of law, whether EPA's decision was subject to ESA Section 7(a)(2). Under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), there is nothing for EPA to reconsider on remand: there is no statutory gap for EPA to fill or ambiguity for EPA to interpret.

Moreover, no factual issues exist warranting further development of the administrative record. No party questioned whether Arizona's program satisfied the criteria set forth in CWA Section 402(b). *E.g.*, Pet. App. 31 n.11, 136. In their petition for review, respondents contended

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[1] Home Builders will use the same abbreviations and conventions as were used in their opening brief. The key statutes at issue are Section 402 of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, and Section 7 of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544.

that EPA violated the ESA, not the CWA. J.A. 257-61. Because the issues to be decided involve the interpretation of statutes, with no dispute about any relevant facts, there is no need for additional investigation by EPA or further explanation of the basis for its decision.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court explained that in reviewing an agency's decision under the Administrative Procedure Act, 5 U.S.C. § 706, a court must initially decide whether the agency "acted within the scope of [its] authority. . . . This determination naturally begins with a delineation of the scope of the [agency's] authority and discretion." 401 U.S. at 415-16. More recently, in deciding whether an EPA decision under the Clean Air Act was ripe for review, the Court explained:

> The question before us here is purely one of statutory interpretation that would not "benefit from further factual development of the issues presented." . . . Nor will our review "inappropriately interfere with further administrative action," . . . since the EPA has concluded its consideration of the implementation issue.

Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 479 (2001) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

Here, EPA has likewise completed its consideration of Arizona's NPDES program submission, and determined that Arizona's program satisfied the exclusive statutory criteria. The "key question is whether EPA may deny a State's proposed program based on criterion – the protection of endangered species – that is not enumerated in § 402(b)." *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) (*AFPA*). This question is purely a matter of statutory interpretation involving EPA's "authority and discretion." *Overton Park*, 401 U.S. at 416.

This is not a case in which the reviewing court "lack[s] an adequate agency-compiled *factual basis* to evaluate the agency action." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (emphasis supplied).

In short, the Court can and should decide whether EPA has discretion to deny a State's proposed NPDES permit program on grounds that are not specified in Section 402(b). The Court also can decide whether ESA Section 7(a)(2) overrides statutory mandates and requires agencies to take affirmative action to benefit endangered species. These are legal questions that a reviewing court is required to decide initially under the Administrative Procedure Act. 5 U.S.C. § 706.

B. The Plain Language Of Section 402(b) Of The Clean Water Act Precludes The Application Of Section 7(a)(2) Of The Endangered Species Act To The Approval Of State NPDES Permitting Programs.

The plain language of Section 402(b) of the CWA precludes the application of Section 7 of the ESA to EPA's approval of State NPDES programs because the criteria specified by Congress in Section 402(b) are exclusive; EPA must approve State NPDES programs meeting those criteria. HB Br. 25-27; EPA Br. 17-19. By stating that EPA "shall" approve State NPDES programs "unless" specifically enumerated statutory criteria are not satisfied, "Congress could not have chosen stronger words to express its intent that [approval] be mandatory." *United States v. Monsanto*, 491 U.S. 600, 607 (1989); see also *Union Electric Co. v. EPA*, 427 U.S. 246, 257 (1976).

Congress' intent is supported by the CWA's explicit policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce,

and eliminate pollution" and to implement the NPDES permit program. 33 U.S.C. § 1251(b). That intent is evidenced further by Congress' deliberate use of "shall" in place of "can" in reconciling the Senate's bill with the House's amended version of the Act. Compare S. Conf. Rep. No. 92-1236, at 138 (1972) ("the Administrator can delegate permit authority to a State"), with *id.* at 139 ("the Administrator *is required to approve* a submitted State program" (emphasis supplied)).

Respondents ignore the plain language of the CWA as well as Congress' explicit choice of mandatory terms in Section 402(b). Instead, they contend that EPA must "evaluate the adequacy of a State's program to provide for the 'protection and propagation of fish, shellfish, and wildlife,'" which in turn implies that ESA Section 7(a)(2) applies to approvals of State NPDES programs. Resp. Br. 8, 46. Respondents' argument is without merit.

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This objective is achieved through the implementation of water quality standards pursuant to CWA Section 303, 33 U.S.C. § 1313, which are developed by each State and approved by EPA. See, *e.g.*, Pet. App. 589-90. NPDES permits must incorporate appropriate effluent discharge limitations and other requirements to ensure that water quality standards are achieved. See *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109-11 (D.C. Cir. 1987); Pet. App. 591-593. After a State NPDES program is approved, EPA exercises its oversight authority to ensure that State-issued permits attain water quality standards. See 33 U.S.C. § 1342(d)(2); Pet. App. 603-07.

Consequently, all NPDES permits, regardless of the issuing authority, must contain appropriate effluent limitations designed to achieve the same water quality standards. For this reason, EPA determined, and FWS agreed, that Arizona's NPDES program would have *no adverse water-quality-related impacts on any listed species*: there was no substantive change in the permit program and no justification for consultation under ESA Section 7. See, *e.g.*, Pet. App. 562-63, 615-17.

Respondents nonetheless claim that the references to "fish, shellfish, and wildlife" in other sections of the CWA, *e.g.*, 33 U.S.C. § 1312(a), provide EPA discretionary authority "with regard to wildlife-related impacts," triggering Section 7(a)(2). Resp. Br. 39 n.14, 46. As explained, however, references in the CWA to "fish, shellfish, and wildlife" concern the development of water quality standards and effluent limitations necessary to maintain the "biological integrity *of the Nation's waters*," 33 U.S.C. § 1251(a) (emphasis supplied), as opposed to delegating EPA authority to generally regulate land use activities that might affect wildlife. See HB Br. 45 (discussing cases addressing EPA's CWA authority).

When read in context, the word "wildlife" plainly refers to species that are dependent on water quality rather than species found in upland desert, such as the pygmy-owl (which is no longer a listed species) and the Pima pineapple cactus – the principal species of concern in this case:

> [A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . "It is a fundamental canon of statutory construction that the words of a statute must be read in their

> context and with a view to their place in the overall statutory scheme."

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Here, the court of appeals acknowledged that under the CWA, EPA's authority to consider the effects on listed species is limited. *E.g.*, Pet. App. 53 n.23 ("Pollution permitting standards that apply to both federal permits . . . and state permits . . . incorporate concerns for the effect of pollutants on *aquatic* species living in waterways affected by water pollution." (emphasis in original)). Nevertheless, the court erroneously held that ESA Section 7(a)(2) "independently empowers EPA to make pollution permitting transfer decisions on behalf of listed species and their habitat." Pet. App. 47. That ruling conflicts with the plain language of CWA Section 402(b), and reads into ESA Section 7(a)(2) a delegation of authority that does not exist.

C. The Application Of Section 7(a)(2) Is Governed By The Services' Longstanding Regulations, Which Are Entitled To Deference.

Home Builders explained in their opening brief (HB Br. 30-34) that, consistent with the Services' regulations, Section 7 does not apply to the approval of State NPDES programs because EPA lacks sufficient discretion to act for the benefit of listed species. 50 C.F.R. § 402.03, promulgated in 1986 following notice-and-comment rulemaking (see *Interagency Cooperation Regulations; Final Rule*, 51 Fed.Reg. 19,926 (June 3, 1986)), provides that Section 7 applies to "all actions in which there is discretionary Federal involvement or control." Similarly, 50 C.F.R. § 402.16 requires that consultation be reinitiated

when "discretionary Federal involvement or control over the action has been retained or is authorized by law." Based on the Services' regulations, the lower courts have repeatedly held that a Federal agency's obligation under Section 7 is limited to its discretionary authority.

For example, in *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082 (9th Cir. 2004), the court considered the extent of the Navy's discretion in operating a submarine base and, applying 50 C.F.R. § 402.03, held that Section 7 did not apply because the agency lacked discretion to discontinue operations. *Id.* at 1092. Although this action was "carried out" by the agency, the court explained that "[w]here there is no agency discretion to act, the ESA does not apply." *Ibid.* In *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969 (9th Cir. 2003), the court also applied 50 C.F.R § 402.03 in determining whether NMFS was required to consult on the issuance of fishing permits under the High Seas Fishing Compliance Act. The court held NMFS was required to consult because the "Compliance Act entrusts the Fisheries Service with substantial discretion to condition permits to inure to the benefit of listed species." *Id.* at 977; see also *In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 630-31 & n.9 (8th Cir. 2005) (evaluating the Corps of Engineers' discretion in operating dams on the Missouri River); Pet App. 64-65 (Thompson, J., dissenting) (listing other decisions applying 50 C.F.R. §§ 402.03 and 402.16).

In this case, once the court of appeals determined that EPA lacked authority to make pollution permitting transfer decisions for the benefit of listed species (see Pet. App. 53), the court should have applied 50 C.F.R § 402.03. Instead of deferring to the Services' interpretation of Section 7, which harmonizes the duties of Federal agencies, the court of appeals reinterpreted Section 7,

effectively overruling the Services' reasonable interpretation of the statute's applicability.

D. *TVA v. Hill* And The 1978 Amendments To The Endangered Species Act Do Not Support The Court Of Appeals' Decision.

Like the court of appeals, respondents ignore the Services' regulations implementing Section 7 and instead contend the ESA is superior to all other laws. Respondents rely principally on *TVA v. Hill*, 437 U.S. 153 (1978), and Congress' 1978 amendments to the ESA. Neither *TVA v. Hill* nor the 1978 amendments support respondents' argument. Indeed, when analyzed in the context of the original version of Section 7 – which respondents fail to address – and the Services' 1986 rulemaking, Section 7's consultation obligation is plainly limited by the authority delegated to the agency in its governing statutes.

1. *TVA v. Hill does not support respondents' expansive view of Section 7.* In *TVA v. Hill*, this Court enjoined completion of the Tellico Dam because the dam's operation would jeopardize the continued existence of a listed species and destroy that species' critical habitat – facts that were not disputed. 437 U.S. at 171. Although the Court found, based on those facts, that "an irreconcilable conflict [existed] between operation of the Tellico Dam and the explicit provisions of § 7," the Court was urged to balance the equities in favor of Tellico Dam based on the status of construction and the expenditure of public funds on the project. *Id.* at 194-95. The Court declined to do so, concluding that Congress had removed any equitable discretion by balancing the equities in favor of endangered species. Contrary to respondents' argument, that is the extent of the holding in *TVA v. Hill*; this Court did not consider whether, let alone hold that Section 7 of the ESA

serves as a font of additional authority, allowing agencies to ignore statutory mandates.[2] See *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (*TVA v. Hill* "did not even consider whether Section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA."); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) ("The [ESA] does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the [CWA].").

2. *The legislative history confirms that Section 7(a)(2) does not apply to non-discretionary actions.* Respondents ignore the original version of Section 7. Instead they argue that because the current version of Section 7(a)(1) is qualified by "utilize their authorities" and Section 7(a)(2) is not, Congress intended to override other, more specific statutory mandates. Resp. Br. 35-36. As Home Builders explained in their opening brief (HB Br. 35-36), Sections 7(a)(1) and 7(a)(2) originated as a single provision, under which the obligations to carry out conservation programs (Section 7(a)(1)) and to avoid

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[2] Relying on *Train v. New York City*, 420 U.S. 35, 43-45 (1975), respondents contend that Congress mandated the completion of Tellico Dam by appropriating funds for the project. Resp. Br. 39 n.14. Respondents' argument mischaracterizes both *TVA v. Hill* and *Train*. First, no party in *TVA v. Hill* argued that the TVA had a non-discretionary obligation to complete the dam, nor did the Court hold that the ESA trumps any such obligation. Rather, *TVA v. Hill* concerned an irreconcilable conflict between a *discretionary* public works project and Section 7. Second, the holding in *Train* was based on a statutory mandate imposed on the agency by Congress to allot funds to qualifying projects. *Train*, 420 U.S. at 43-44. The Court concluded that if funds had been appropriated and the project was eligible to receive them, the agency must comply with the statute and allot the funds. *Id.* In contrast, lump-sum appropriations, such as those at issue in *TVA v. Hill*, are generally discretionary in nature. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citing *TVA v. Hill*).

jeopardy (Section 7(a)(2)) were both qualified by the phrase "utilize their authorities." Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). Moreover, Section 2(c) of the ESA declared Congress' policy that all federal agencies "shall utilize their authorities in furtherance of" the Act. *Id.* at § 2(c), 87 Stat. 885 (currently at 16 U.S.C. § 1531(c)(1)). The 1973 legislative history reinforces that policy. See H.R. Rep. No. 93-412, at 6 (1973) ("Federal agencies are to use the authorities that are available to them in carrying out the objectives of the bill"); *id.* at 9 ("The policy of the legislation is to state a national purpose that all federal agencies and instrumentalities will take steps within their authorities to protect endangered species.").

For respondents' argument to be valid, Congress must have expanded Section 7's substantive obligation when it reorganized Section 7 in 1978. As the court of appeals acknowledged, however, the "1978 amendment did not change section 7's substantive provisions." Pet. App. 36; see Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751. Indeed, Congress' primary concern in authorizing funding for the ESA in 1978 was whether to *weaken* Section 7 because of perceived abuses. See, *e.g.*, 124 Cong. Rec. 37,115 (daily ed. Oct. 13, 1978) ("Now, not all of us have snail darters, furbish lousewarts, or sand hill cranes in our districts; but we do have a vested interest in making the agency in charge of enforcing the provisions of the act conform to its original intent." (statement of Rep. Lott)).

Despite this controversy, Congress chose to "retain existing law," H.R. Conf. Rep. No. 95-1804, at 18, which requires agencies to "utilize their authorities" in complying with Section 7, *i.e.*, to take action within their discretion under their governing statutes. There is nothing in either the 1978 amendments or the legislative history

suggesting otherwise. For example, Congress added Section 7(c) (codified at 16 U.S.C. § 1536(c)), which requires Federal agencies to conduct biological assessments before entering into construction contracts or beginning construction of a project "to assist Federal agencies in complying with section 7" by identifying "conflicts between an agency action and a listed species." H.R. Rep. No. 95-1625, at 20 (1978). The House Report also explained: "It is the intent of this committee that this review process take place well *before the exercise of agency discretion* which would result in contracts for construction, actual construction activities, or other potentially destructive activity." *Ibid.* (emphasis supplied). This discussion assumes that an agency is acting pursuant to its discretionary authority, rather than fulfilling a non-discretionary mandate.

3. *The creation of the Endangered Species Committee did not expand the applicability of Section 7(a)(2).* Respondents also contend the establishment of the Endangered Species Committee (Committee) indicates Congress intended for the ESA to supersede an agency's non-discretionary obligations. Resp. Br. 42-43. The exemption process, however, assumes that the agency's proposed action is subject to Section 7 consultation.[3] In other words, the exemption process is available to address irreconcilable conflicts between an agency's proposed *discretionary* actions and a jeopardy biological opinion – such as the construction and operation of a dam in *TVA v. Hill*. When an agency lacks discretion to act for the benefit

[3] Contrary to respondents' suggestion (Resp. Br. 42-43), the Committee cannot override laws or alter an agency's authorities. Any mitigation and enhancement measures must be both authorized and funded by Congress "concurrently with all other project features." H.R. Conf. Rep. No. 95-1804, at 22 (1978).

of listed species in the first place, the duty to consult is not triggered. 50 C.F.R. § 402.03. Consequently, respondents point to nothing that shows the creation of the exemption process was intended to resolve conflicts between the ESA and other statutory mandates imposed by Congress, or that Congress intended to expand the applicability of Section 7 to non-discretionary actions.[4]

E. EPA's Clarification Of Its Position Is Not A Reversal Of Prior Agency Policy, Nor Is EPA's Clarification *Post Hoc* Rationalization.

Respondents attack the letters exchanged between EPA and the Services, claiming that the letters constitute a reversal of the agencies' prior policy and are impermissible *post hoc* rationalization. Resp. Br. 24-27. As a preliminary matter, the letters do not constitute *post hoc* rationalization because EPA, the agency charged with administering the CWA, never took the position that it could disapprove Arizona's NPDES program even if the program satisfied the statutory requirements in CWA Section 402(b). Rather, the inconsistency was created by the court of appeals, which acknowledged EPA's lack of discretion and, instead of applying 50 C.F.R. § 402.03, reinterpreted ESA Section 7(a)(2) to conclude that consultation was required. See Pet. App. 53 ("[T]he [CWA]

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[4] Respondents note that Congress on several occasions has exempted specific projects from Section 7, citing *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996). Resp. Br. 45 n.16. This point suffers from the same infirmity. The Federal action involved in the red squirrel litigation, approval to construct an astrophysical complex and access road on National Forest land, was *discretionary*. See *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1443-48 (9th Cir. 1992) (discussing factual background). Respondents have not pointed to any specific exemptions for non-discretionary projects.

does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species; the EPA has that authority only when one also considers the [ESA]."); compare *id.* at 138-41 (Kozinski, J., dissenting from denial of rehearing).

The question of whether Section 7(a)(2) overrides EPA's non-discretionary obligation to approve State NPDES programs was squarely raised below by the State of Arizona and Home Builders, and that question was argued before, and decided by, the court of appeals. See, *e.g.*, Pet. App. 68 ("The EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary; I would deny the petition for review.") (Thompson, J., dissenting). Regardless of whether the Court considers the agencies' letters, the legal issue of EPA's authority and discretion under CWA Section 402(b), as explained above, is properly before this Court and ripe for decision.

Respondents also erroneously assume that EPA previously adopted a policy governing the applicability of Section 7 to State NPDES program approvals. As explained in Home Builders' opening brief (HB Br. 11-13), for some 20 years, and on more than 100 occasions, EPA approved State NPDES program submissions without consulting with the Services. Consultation occurred only six times prior to Arizona's program submission. EPA's Federal Register notices concerning those States' NPDES programs indicated that EPA was uncertain whether Section 7 applied to approvals under Section 402(b) and, if so, whether EPA could refuse to approve a State's program meeting the statutory criteria. See *Approval of Application by Texas to Administer the NPDES Program*, 63 Fed.Reg. 51,164, 51,198 (Sept. 24, 1998); *Approval of Application by Oklahoma to Administer the NPDES Program*, 61

Fed.Reg. 65,047, 65,051 (Dec. 10, 1996).[5] In addition, those consultations were limited to species dependent on surface water quality, and did not involve assertions by the Services that ESA Section 7 authorized EPA to disapprove a State's program on grounds unrelated to water quality. See HB Br. 12-13.

Although EPA and the Services entered into a memorandum of agreement in 2001 to improve interagency coordination, this document did not address whether Section 7(a)(2) applies to State program approvals. *Memorandum of Agreement Between EPA, FWS and NMFS Regarding Enhanced Coordination Under the CWA and the ESA*, 66 Fed.Reg. 11,202 (Feb. 22, 2001) (Pet. App. 245-317). Instead, as explained in Home Builders' opening brief (HB Br. 13), the National MOA stated only that "EPA's current practice" is to consult with the Services "on a case-by-case basis." Pet. App. 260. The agencies' introductory discussion also acknowledged the Fifth Circuit's decision in *AFPA*, and indicated that the National MOA "does not place conditions on approval of State

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[5] For example, in connection with approving Texas' NPDES program, EPA explained:

> It was clearly Congress' intent that states have every opportunity to directly administer the NPDES program and that EPA's main role would be providing national consistency and guidelines in an oversight role. EPA was only intended to run the NPDES program until states could develop programs adequate to protect the waters of the U.S. To this end, EPA has never been fully funded to do all the jobs required for full direct implementation of the NPDES program. This is the responsibility of State-run programs, and provides incentives for states to take over the program. States that wish to directly ensure protection of its [sic] State resources, and equitable treatment of its regulated public will take over the responsibilities of the NPDES program as Texas has applied to do.

Approval of Application by Texas, 63 Fed.Reg. at 51,167.

NPDES programs." *Id.* at 266; see also *Approval of Application by Texas*, 63 Fed.Reg. at 51,198.

When compared to the agencies' prior administrative practice, the consultation on Arizona's NPDES program submission is the outlier. EPA submitted a biological evaluation to FWS, explaining that approval of Arizona's program is not likely to adversely affect any listed species and critical habitat dependent on surface waters in Arizona. Pet. App. 614-18. Although FWS employees in the Arizona field office agreed that there would be no adverse impacts related to water quality, they insisted on consulting on impacts over which EPA has no control. Pet. App. 562-63; J.A. 121-23. FWS employees also advocated for the implementation of "a consultation process, or an alternative process similar to that which currently exists" as a condition to approval of Arizona's program, which would conflict with both the Fifth Circuit's holding in *AFPA* and the National MOA. Pet. App. 563, 571.

Ultimately, the agencies were required to elevate the issue to senior officials in Washington, indicating the lack of any definitive agency policy. The need to develop a coherent administrative position was heightened by the State of Alaska's NPDES program submission last July. See EPA Pet. App. 93a-94a.[6]

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[6] Respondents suggest that Alaska's program submission is irrelevant to evaluating the degree of deference to which the agencies' letters are entitled, noting that Alaska's program submission was determined to be deficient. Resp. Br. 27 n.10. As the record in this case shows, however, a State's program submission, even if initially determined to be deficient, triggers administrative action by EPA. Arizona initially requested NPDES program approval on December 20, 2001, and its submission package was received on January 14, 2002. Pet. App. 546-47. Arizona's program submission was found deficient in a number of respects (J.A. 10-26), was resubmitted to EPA on June 11, 2002, and then supplemented on July 8 and 10, 2002 (Pet. App. 547).

(Continued on following page)

Consequently, it is inaccurate to characterize the agencies' letters as *post hoc* rationalization. Under *Chevron*, an agency must be allowed to assess "the wisdom of its policy on a continuing basis," 467 U.S. at 864, and, indeed, the agency's discretion to establish policies does not end once the agency action is appealed. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its own regulation advanced in litigation). The interpretation adopted by EPA and the Services "reflect[s] the agenc[ies'] fair and considered judgment on the matter in question" (*ibid.*), and is consistent with the positions of the agencies at the time Arizona's program was approved, *i.e.*, EPA cannot withhold approval of a State's NPDES program that meets the criteria in CWA Section 402(b).

F. Respondents Will Not Be Prejudiced By The Court's Resolution Of The Legal Questions Presented In This Case.

Respondents erroneously contend that they will be prejudiced if the Court were to decide the questions presented by this case. See Resp. Br. 27-32. To the contrary, the only parties that will be prejudiced are the State of Arizona and the regulated community if this matter is remanded to EPA. If the court of appeals' judgment vacating Arizona's NPDES program becomes effective, authority to issue NPDES permits would immediately shift back to EPA. As explained by the State of Arizona, this would disrupt the current permitting

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Rather than waiting until Arizona's program submission was found complete, EPA requested the initiation of informal consultation on January 23, 2002 (J.A. 7-9) and prepared and submitted its biological evaluation on June 21, 2002 (Pet. App. 581). EPA nevertheless was unable to meet the 90-day statutory deadline for acting on Arizona's submission.

process, halt or delay legitimate business activities, and result in adverse environmental impacts. See Arizona's Br. 3-6. Furthermore, Arizona would be forced to spend additional public funds to duplicate the same process that was successfully completed in 2002. Because the court of appeals' decision frustrates Congress' intent, Arizona and its citizens would suffer irreparable injury. See *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977) ("any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury").

The court of appeals acknowledged that "all of the actors in this case – Arizona, the EPA, and FWS – operated in a somewhat murky legal environment," and were "[f]aced with two circuit court cases suggesting that EPA lacked authority to make pollution permitting transfer decisions based on [ESA] concerns." Pet. App. 62. Without clear guidance from this Court, the same "murky legal environment" will continue to exist. On remand, what legal standard applies? And what legal standard applies to NPDES program submissions by States in circuits with no clear precedent to follow, such as Massachusetts and New Mexico? Do those circuits follow this case, *AFPA*, or perhaps previous Ninth Circuit decisions, such as *Ground Zero*, that have followed 50 C.F.R. § 402.03 in holding that ESA Section 7(a)(2) applies only to actions in which there is discretionary Federal involvement or control? Home Builders submit this is precisely the sort of intra- and inter-circuit conflict that this Court should resolve.

Against this backdrop, respondents' claim of being prejudiced rings particularly hollow. Respondents initially assert that they have been prejudiced by submission of the agencies' letters clarifying the applicability of Section 7 to EPA's approval of State NPDES program submissions. Resp. Br. 28. That issue, however, was briefed and argued

below. Respondents are not entitled to remand in order to relitigate the same issue.

Respondents also contend that the agencies' letters deprived them of their right to participate in administrative proceedings concerning Arizona's program submission, citing 40 C.F.R. § 123.61(b). Resp. Br. 28. The relevant subsection of EPA's regulation, 40 C.F.R. § 123.61(a)(1), requires the agency to provide a comment period "during which interested members of the public may express their views *on the State program*" (emphasis supplied), not on the "correct" interpretation of CWA Section 402.[7] It would be a pointless exercise to remand this matter back to EPA for the purpose of receiving additional public comments on Arizona's NPDES program, which has already been determined to satisfy the criteria in CWA Section 402(b).

Respondents additionally suggest that if the Court were to remand this matter, they might raise new challenges to Arizona's program submission, *i.e.*, claims that were not asserted timely under 33 U.S.C. § 1369(b)(1)(D) and, therefore, have been waived. For example, respondents state they would argue that funding provided by EPA would trigger the application of Section 7(a)(2). Resp. Br. 29. However, EPA's decision to provide financial assistance to Arizona for the administration of environmental programs is a separate and discrete agency

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[7] Respondents' argument further implies that they possess some sort of public comment right in regard to consultations conducted under ESA Section 7(a)(2). See Resp. Br. 28. No such right exists. In their 1986 rulemaking, the Services specifically addressed the extent of public participation in the consultation process, explaining that "[n]othing in section 7 authorizes or requires the Service to provide for public involvement (other than that of the applicant) in the 'interagency' consultation process." *Interagency Cooperation Regulations*, 51 Fed.Reg. at 19,928 (Pet. App. 329).

action. Put simply, the criteria in Section 402(b) do not include Federal financial assistance. Respondents erroneously assume that approval of a State's NPDES program and agency funding decisions are a single action.

Next, respondents suggest that they would argue, on remand, that compliance with ESA Section 7(a)(2) is triggered by references in the CWA to "fish, shellfish, and wildlife." Resp. Br. 30. As explained above, the CWA's objectives are achieved through the implementation of water quality standards, and NPDES permits, whether issued by EPA or by a State, must incorporate appropriate effluent discharge limitations to ensure those standards are satisfied. Respondents apparently would argue instead that, in issuing NPDES permits, EPA regulates how private land is used under the guise of protecting "the biological integrity" of navigable waters. That argument flies in the face of Congress' explicit recognition of the right of each State to "plan the development and use (including restoration, preservation, and enhancement) of land and water resources," and of "the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(b) & (g); see also *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

Finally, respondents suggest that EPA's position is inconsistent with other statutory obligations imposed on the agency because EPA complied with the "coordination process" required by the National Historic Preservation Act, 16 U.S.C. § 470(f) ("NHPA"). Respondents suggest that EPA's voluntary compliance with the NHPA results in an "anomalous position" that "section 7(a)(2) is the *only* legal obligation imposed on the federal government that EPA should ignore in making NPDES transfer decisions . . . ." Resp. Br. 31. This argument is without merit. Respondents do not explain why EPA's coordination with others under

the NHPA is actually inconsistent with EPA's position that under the CWA, EPA must approve State NPDES programs that meet the criteria in Section 402(b).

G. Conclusion

For the foregoing reasons, and for those stated in Home Builders' opening brief, the judgment of the court of appeals should be reversed.

DATED: April 10, 2007.

Respectfully submitted,

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In The

Supreme Court of the United States

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Petitioners,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF ALASKA IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The State of Alaska files this amicus brief in support of the petitions for writ of certiorari filed by the United States Environmental Protection Agency (EPA) and the National Association of Home-Builders *et al.*[1] Alaska is keenly interested in this case because it has recently applied to the EPA to assume responsibility for administration of the National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act (CWA).[2] The CWA provides that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact."[3] EPA and the Alaska Department of Environmental Conservation (Alaska) are currently discussing the legal adequacy of Alaska's program application.

The decision of the Court of Appeals for the Ninth Circuit[4] has created uncertainty and concern for Alaska in its on-going efforts to secure EPA's approval of its NPDES permitting program. Alaska agrees with the petitioners that the Ninth Circuit decision merits review by this Court, and urges the Supreme Court to grant the petitions for a writ of certiorari.

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[1] Sup. Ct. R. 37.

[2] *See* 33 U.S.C. § 1342(b).

[3] *Id.*

[4] *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005).

ARGUMENT

Alaska urges the Court to review the Ninth Circuit decision because it imposes on the EPA a duty unintended by Congress, to determine whether transfer of NPDES permitting authority to state officials would jeopardize species listed under the Endangered Species Act (ESA). The practical consequence of the decision is to impose the duty of ESA consultation onto state officials, at least in those few states that don't already have an EPA-approved permit program. The decision also conflicts with decisions from other circuits that have considered the same issue.[5]

Alaska is one of only five states that have not yet received EPA approval to assume responsibility for administering the NPDES permit program.[6] Over the past two years, Alaska has been actively developing all required components of its program submission, in close coordination with EPA's Region 10 staff. In assembling its NPDES program, Alaska has been guided by the federal statutory[7] and regulatory[8] criteria for approval of a state program. After two years of preparation, Alaska filed its formal application with EPA on July 5, 2006.

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[5] *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) and *Platte River Whooping Crane Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992); *See* Sup. Ct. R. 10(a).

[6] *See Defenders of Wildlife v. EPA*, 420 F.3d at 950. The other four states without an approved program are Idaho, Massachusetts, New Hampshire and New Mexico.

[7] *See* CWA § 402(b), 33 U.S.C. § 1342(b).

[8] *See* 40 C.F.R. Part 123.

The Ninth Circuit decision in this case threatens to disrupt Alaska's efforts by introducing difficult and unexpected questions about whether and how EPA must comply with the ESA in considering whether to approve Alaska's program. The decision effectively adds to the CWA's listed criteria for a state permit program approval the requirement that the EPA include a consultation under ESA section 7(a)(2), to evaluate the impacts on listed species of a state program approval.[9] The Ninth Circuit imposed this additional requirement despite the CWA's plain directive that the EPA "shall approve" state applications that satisfy the specific criteria set forth in 33 U.S.C. § 1342(b).[10]

In addition to contradicting the plain language of the CWA, the decision presents practical difficulties both for the EPA and for a state such as Alaska, that hopes to administer the program. In considering a state's NPDES program application, the EPA cannot meaningfully evaluate potential effects on endangered species caused by federal approval of a state's NPDES program. Presumably any such effects would not arise from EPA's program approval itself, but rather from specific discharges that the state might authorize in the future. Yet, when EPA first approves a state NPDES program, it has no way of knowing precisely for what kinds of future projects and activities applicants may seek discharge permits from the

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[9] Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

[10] *See* 42 U.S.C. § 1342(b)(1)-(9).

state. To intelligently evaluate potential effects of state-issued permits on listed species, the EPA would need to know what activities might someday be contemplated, including where a discharge might be proposed, and what listed species, if any, might inhabit whatever area might be impacted.

In the absence of that site-specific information, evaluation of potential effects on endangered species is an exercise in speculation. The futility of such an exercise is particularly evident in Alaska. Obviously, the sheer size of this state, and the extent of its coast-line, dwarfs that of any other state. Most of Alaska remains a pristine wilderness, providing habitat to many species, including thirteen species listed as either endangered or threatened under federal law.[11] Presumably, one tasked with evaluating, at the program approval stage, how a state permit program might impact endangered species in Alaska, would have to invent myriad discharge scenarios into different ecosystems. Such an evaluation, no matter how comprehensive, would still be mere speculation.

To satisfy the Ninth Circuit's new requirement, a state such as Alaska would have to replicate the federal consultation process for each permit that the state proposes to issue. The practical consequence of this is that Alaska would have to take on an additional, potentially enormous administrative responsibility (i.e., ESA consultation) in order to administer the NPDES program. ESA consultation is not something that the State of Alaska currently does, in any context. Placing such a duty on the state

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[11] *See* http://ecos.fws.gov/tess_public/StateListing.do?status=listed&state=AK

would contradict the ESA's own terms, which provide that consultation requirements apply only to other federal agencies, and not to states.[12] Thus, the Ninth Circuit decision effectively revises not only the CWA's list of program approval criteria, but also the ESA's statement of applicability.

If there is another way for a state NPDES program to obtain EPA approval in the shadow of this decision, the Ninth Circuit did not acknowledge it. Instead, the court considered and rejected several other ways of protecting endangered species, as alternatives to imposing the duty of ESA section 7(a)(2) consultation on the state. Those alternatives included EPA's continuing oversight of an approved state program, both under a Memorandum of Agreement with the Services[13] and over each state-issued permit; ESA's "anti-take" provisions under sections 9 and 10[14]; Arizona laws protecting native plants; and Arizona's written assurances that it will protect endangered species.[15] The Ninth Circuit's rejection of these alternative paths to ESA compliance leaves Alaska with little hope that it can get an approved program without replicating the consultation procedures required of federal agencies under ESA section 7(a)(2).[16]

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[12] *See* ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

[13] The term "Services" refers to the U.S. Fish and Wildlife Service for terrestrial species, and the National Marine Fisheries Service for marine species. *See* 50 C.F.R. §§ 402.02, 402.14.

[14] *See* 16 U.S.C. §§ 1538(a), 1539.

[15] *See Defenders of Wildlife*, 420 F.3d at 973-977.

[16] Unlike Arizona, Alaska has a state Endangered Species Act, codified at AS 16.20.180-.210. But the panel majority opinion in *Defenders* sheds no light on whether such a state program, which is

(Continued on following page)

Finally, Alaska is concerned that the decision may have implications extending beyond the NPDES context. The Ninth Circuit's rationale may lead other federal agencies to undertake ESA section 7 consultation in their review of other proposed delegations of federal programs to Alaska. For example, if the decision is left to stand, it could affect federal fishery preemption and delegation decisions under the Magnuson-Stevens Act[17]; Alaska's efforts to regain federal delegation of subsistence management authority under the Alaska National Interest Lands Conservation Act[18]; and Alaska's efforts to obtain delegation of management authority over marine mammals under the Marine Mammals Protection Act.[19] The basic rationale of the decision, which applies ESA section 7(a)(2) to non-discretionary federal decisions arising under other federal statutes, could well erode the state's right to primacy in other statutory and regulatory contexts.

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different from the federal act, would be sufficient to support EPA approval of an NPDES program.

[17] *See* 16 U.S.C. § 1856 (providing for state jurisdiction in state waters, authorizing delegation of jurisdiction to states in federal waters, and providing for preemption of state management after a hearing in narrow circumstances).

[18] *See* 16 U.S.C. § 3115(d) (providing that the federal subsistence management program will not be implemented if the State enacts and implements laws of general applicability consistent with specific requirements of ANILCA).

[19] *See* 16 U.S.C. § 1379(b), (f) (allowing transfer of marine mammal management authority to the State of Alaska if specific criteria are met).

CONCLUSION

Alaska would like to join the vast majority of states that have already assumed from the federal government the responsibility of issuing permits for discharges of pollutants into surface waters. Congress clearly intended for states to take on this function.[20] The Ninth Circuit decision in this case frustrates Congress' intent, and also is impeding Alaska's on-going efforts to develop an NPDES permit program that EPA can approve. The decision also deepens the divide between circuits on the legal issue of whether ESA consultation is required on the approval of a state NPDES program. This Court should grant the two pending petitions for writ of certiorari and review the Ninth Circuit decision.

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[20] *See* CWA § 101(b), 33 U.S.C. § 1351(b).

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Nos. 06-340 and 06-549

IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents more than five million member families through member organizations in all 50 States and Puerto Rico.

AFBF members are directly affected by the issues presented in the Petitions filed by Federal Defendants/ Petitioners in No. 06-549 ("Fed. Pet."), and by Intervenor-Defendants/Petitioners in No. 06-340 ("NAHB Pet."). Some of AFBF's members operate poultry or livestock farms subject to Clean Water Act ("CWA") Section 402 National Pollutant Discharge Elimination System ("NPDES") regulation as "concentrated animal feeding operations." *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23 (CWA statutory and regulatory provisions addressing concentrated animal feeding operations). These members therefore share the interest of other NPDES-regulated entities in maintaining the current system – threatened by the ruling below – in which State-issued NPDES permits do not trigger Endangered Species Act ("ESA") Section 7 compliance obligations. *See*

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than AFBF, its members, and its counsel made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All petitioners other than the United States Environmental Protection Agency ("EPA") submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. Petitioner EPA, which filed a separate petition for writ of *certiorari*, has provided written consent to AFBF to file this brief. That written consent has been filed with the clerk.

Brief of *Amicus Curiae* Federal Water Quality Coalition in Support of Petitions for Writ of Certiorari at 1-3.

More broadly, many AFBF members rely in some way on a wide array of federal government programs or services that are also threatened by the reasoning of the decision below. By ruling that ESA Section 7(a)(2) constitutes an overriding legal constraint applicable to every federal agency action – regardless of contrary provisions in the agency's organic laws – the Ninth Circuit's decision undermines the ability of federal agencies to act (let alone act promptly) under a myriad of programs in which they have been directed by Congress to issue any manner of permit, license, approval, certification, loan, grant, insurance, or compensation, or to provide any other government service (*e.g.* assistance with the design and implementation of farm conservation and other management practices). Given the breadth of the panel's interpretation of ESA Section 7 and the sweeping applicability of its reasoning to *any and every* federal agency action, the ruling is quite literally of concern to all individuals and businesses – including America's farmers and ranchers – that interact with any federal agency or program. AFBF submits this brief to urge the Court to review the ruling below and resolve these important legal issues.

SUMMARY OF ARGUMENT

The divided opinion below[2] clearly warrants review under the considerations traditionally applied by this Court and as stated in Rule 10. The questions presented concern recurring issues of broad significance on which there are mature circuit conflicts. This Court's guidance is urgently needed because the Ninth Circuit's view, as expressed in the ruling below, has grave consequences for a wide variety of beneficial federal programs and productive private land uses.

REASONS FOR GRANTING THE PETITION

1. The principal question presented is whether ESA Section 7(a)(2): (1) is a supplemental provision that operates within the confines of a federal agency's authority under its organic laws as enacted by Congress (which is the view of the United States, the view expressed in 50 C.F.R. § 402.03, and the view of most lower courts); or (2) is an overriding constraint, and font of new authority, applicable to every federal agency action (the majority view of the split Ninth Circuit panel below). *See* Fed. Pet. at I, 9-21; NAHB Pet. at i, 11-22. Federal petitioners (at 21) briefly describe that resolution of this question has great significance to a wide range of federal programs. Amicus expands on that significance below.

The significance of the ruling below extends far beyond the CWA. Many federal statutes direct federal agencies to issue permits, licenses, approvals, loans, grants, insurance, or compensation if a prescribed set of standards is satisfied.

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[2] *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946, 961 (9th Cir. 2005), *rehearing denied*, 450 F.3d 394 (9th Cir. 2006) ("*Defenders*") (Fed. Pet App. 1a-67a, 68a-92a).

Under the panel majority's ruling, however, *no such action* can be taken: (1) procedurally, until the federal agency completes a process of "consultation" with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (the "Services") pursuant to ESA Section 7(a)(2); and (2) substantively, if taking the action as directed by Congress under another statute is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. *Defenders*, 420 F.3d at 961-69 (Fed. App. 26a-44a).

The court below ruled that ESA Section 7(a)(2) operates as an overriding legal constraint on every action taken, authorized, or enabled by a federal agency, notwithstanding the contrary mandates of other applicable statutes. This view has sweeping implications, potentially impairing the ability of federal agencies to provide – and to provide in a timely manner – a wide variety of government services, benefits, and permits mandated under other laws. The ruling thus "has far-reaching effects on the scope of the Endangered Species Act" – if "the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* agency." *Defenders*, 450 F.3d at 398-99 and n.4, 401 (9th Cir. 2006) (Kozinski, J., dissenting (along with five other judges) from the denial of rehearing en banc) (Fed. App. 69a, 74a-79a, 82a).[3] *See* Sherry Bosse, *Defenders of Wildlife v. EPA: Testing the Boundaries of Federal Agency Power under the ESA*, 35 ENVTL. L. 1025, 1052 (2006) ("In

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[3] Judge Kozinski also accurately describes that, because the Ninth Circuit has not "fixed the problems [of inconsistent case law and circuit conflicts] ourselves," this places the Ninth Circuit "in a highly precarious position vis a vis . . . the Supreme Court." 450 F.3d at 401 (Fed. App. 82a).

Defenders, the Ninth Circuit articulated a sweeping grant of additional authority to agencies to protect species under the ESA.").[4]

One need look no further than the existing, muddled body of decisions for illustrations of the variety of federal programs affected. ESA Section 7(a)(2) compliance issues often arise, for example, with respect to agency action being taken pursuant to a prior contract or permit that limits the agency's authority. Some appellate courts (including some Ninth Circuit panels) have found that ESA Section 7 does not override the limitations imposed by contract or permit and therefore does not apply.[5] In other decisions significant

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[4] On the merits, the Bosse article rightly concludes that the "analytic approach the court used to arrive at this conclusion does not withstand scrutiny." *Id.*; *see id.* at 1039-58 (describing "several serious analytic missteps" in the Ninth Circuit's "critically flawed" interpretation of ESA Section 7(a)(2) and the implementing rule at 50 C.F.R. 402.03. More important at this stage, however, even those advocating a broad view of the role of Section 7 agree that "[q]uestions as to the proper meaning and interpretation of § 402.03 arise regularly in the courts." Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 STAN. ENVTL. L. J. 125, 179 (2006); *see id.* at 151-94 (discussing over 20 decisions and the "discordant case law").

[5] *E.g.*, *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (ESA Section 10 incidental take statement and related contract were read not to include a duty to reinitiate ESA consultation upon the listing of a new species); *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (pre-ESA right-of-way agreement with Bureau of Land Management did not include the ability to alter rights-of-way to reduce impacts on listed species, so no ESA Section 7 consultation is required); *Platte River Whooping Crane Habitat Maintenance Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (no ESA Section 7 duty to impose wildlife conditions on annual licenses for hydropower project).

for irrigated agriculture, however, Ninth Circuit panels have inconsistently found that ESA Section 7 essentially amends the terms of pre-ESA water contracts. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000); *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995).

Federal agencies often provide insurance, grants, or other forms of economic assistance or incentives pursuant to statutory directives. In such settings, some courts following the same reasoning as the Ninth Circuit below have found that ESA Section 7(a)(2) applies and imposes crosscutting constraints on the ability to provide that assistance. *Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1289-93 (S. D. Fla. 2005), *appeal pending*, No. 05-16374-II (11th Cir.) (ESA Section 7(a)(2) limits Federal Emergency Management Agency's flood insurance program). *Key Deer* and the decision below thus threaten to impair federal assistance under a broad array of programs – from social security to farm support to natural disaster response – because each act is subject to the procedural prerequisite of consultation and to the substantive limitations stated in ESA Section 7(a)(2).

Federal agencies also frequently have some permitting or certification role with regard to private or State actions. Several courts have found that ESA Section 7(a)(2) does not apply in a way that expands that role. *Strahan v. Linnon*, 967 F. Supp. 581, 607-08, 620-21 (D. Mass. 1997), *aff'd*, 187 F.3d 623 (table), 1998 WL 1085817 at *3 (1st Cir. 1998) (ESA Section 7 does not apply to Coast Guard certificates of documentation and inspection for ships, even though the ships can endanger whales and other listed marine species); *see Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985). The decisions of the Ninth Circuit below and in *Washington Toxics Coal. v. United States Envtl. Prot.*

Agency, 413 F.3d 1024 (9th Cir. 2005), are to the contrary. *See* pages 15-16 *infra*.

The issues raised here even have national security implications, largely because the Ninth Circuit's ruling reads ESA Section 7(a)(2) to overcome all other laws. The opinion below provides prospective plaintiffs with a potent precedent to delay military training exercises and the like until an often-lengthy consultation process is completed – and to preclude them altogether if the exercises would adversely modify critical habitat or jeopardize the continued existence of any ESA-listed species. *Compare Ground Zero for Non-Violent Action v. United States Dep't of Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (rejecting such a claim through an analysis that seems inconsistent with the reasoning of the panel below); Hasselman, *supra* note 4, at 161 (Earthjustice attorney questions *Ground Zero*).

In sum, the question of how ESA Section 7(a)(2) interrelates with a federal agency's organic laws already occurs with considerable frequency, and that frequency will certainly not abate in light of the ruling below. The Court should accept review to provide much-needed guidance on a recurring issue of great significance, especially as the lower courts have reached inconsistent results.

2. Both Petitions clearly establish that there are mature conflicts in the circuits (as well as conflicts within the Ninth Circuit)[6] on the relationship between ESA Section 7(a)(2)

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[6] As Judge Kozinski wrote in dissenting from the rehearing denial, the panel's ruling "ignores six prior opinions of our own court" and is "precisely the kind of case we should take en banc to set our own house in order." *Defenders*, 450 F.3d at 394 (Fed. App. 69a); *see id.* at 400 (the "majority opinion squarely . . . conflicts with the Fifth and D.C. Circuits") (Fed. App. 79a). And as Judge

(continued....)

and an agency's organic laws. *See* Fed. Pet. at 19-20; NAHB Pet. at 11-18. As the Petitions develop, the panel opinion below conflicts with decisions of the Fifth and D.C. Circuits. *Am. Forest & Paper Ass'n v. United States Envtl. Prot. Agency*, 137 F.3d 291, 297-99 (5th Cir. 1998); *Platte River*, 962 F.2d at 34.

We would add that the panel's ruling is also at least in tension with decisions from three other circuits. They are: the First Circuit (*Strahan v. Linnon*, 187 F.3d 623 (table), 1998 WL 1085817 (1st Cir. 1998)), the Eighth Circuit (*In re Operation of the Missouri River Sys. Litig.*, 421 F.3d 618, 630-31 (8th Cir. 2005)), and the Tenth Circuit (*Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1127 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985)).[7] Moreover, the over 20 district court and circuit court opinions on the relationship between ESA Section 7(a)(2) and an agency's organic laws reflect that

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(continued) . . .

Thompson described in his dissent from the panel opinion, the ruling is inconsistent with several Ninth Circuit decisions and statements. *Defenders*, 420 F.3d at 979-80 (Fed. App. 64a-65a).

[7] The panel asserted that its view of ESA Section 7(a)(2) is supported by decisions of the First and Eighth Circuits. 420 F.3d at 970 (Fed. App. 44a-46a), citing *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 882 F.2d 1294, 1299 (8th Cir. 1989), and *Conservation Law Found. v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979). Amicus agrees with the Solicitor General's position that the Ninth Circuit's reliance on these decisions is unwarranted. Fed. Pet. at 20 n.7. Moreover, the cited Eighth Circuit opinion addressed only an ESA Section 9 "take" violation, 16 U.S.C. § 1538, not the scope of Section 7. 882 F.2d at 1300. More recently, the Eighth Circuit indicated its acceptance of the narrower view of ESA Section 7 in its *Missouri River System* opinion. 421 F.3d at 630-31.

"courts have been inconsistent" and there is "discordant case law." Hasselman, *supra* note 4, at 180, 193.

Accordingly, the Petitions clearly satisfy this Court's Rule 10(a) standard for accepting review. There is a conflict in the circuits on an important, recurring question of federal law.

3. The court below essentially read out of existence the longstanding formal regulation at 50 C.F.R. 402.03 – which provides that Section 7 applies only to the extent there is "discretionary Federal involvement or control." The panel majority twists 50 C.F.R. § 402.03 in a fashion contrary to the Services' own reading, contrary to the language of the rule, and contrary to the reading of other courts. *See* Fed. Pet. at 18; NAHB Pet. at 20-22; Bosse, *supra* page 4, at 1042-47. Thus, review is warranted because the decision below is contrary to this Court's precedents on the respective roles of federal agencies and the judiciary in construing regulations and on the degree of deference owned to agency statutory interpretations. *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (agency interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'"); *United States v. Mead*, 533 U.S. 218 (2001); *Defenders*, 450 F.3d at 397-98 (9th Cir. 2006) (Kozinski, J., dissenting with five other judges) (Fed. App. 73a-74a); Fed. Pet. at 18.

4. Both Petitions encompass the question of whether the ruling below contravenes this Court's ruling in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), by concluding that EPA's approval of Arizona's CWA Section 402 permitting program is the legally relevant cause of impacts to endangered species directly caused by future privately initiated, state-permitted land use activities. *See* Fed. Pet. at 12-13; NAHB Pet. at i-ii, 24-29. This aspect of

the decision below does contravene a precedent of this Court and warrants review.[8]

The opinion below also is in tension with other precedents of this Court regarding causation. The Court construed ESA Section 9 liability to be limited by concepts of "proximate cause" in *Babbitt v. Sweet Home Chapter of Communities for a Gr. at Oregon*, 515 U.S. 687, 697 n.9, 700 n.13, 709-14 (1995). Similar limits should be read into ESA Section 7 to avoid federalizing a wide variety of State and private actions.[9]

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[8] *See id.*; *Defenders*, 450 F.3d at 394, 398-99 (Judge Kozinski's analysis of the inconsistency with *Public Citizen*) (Fed. App. at 69a, 76a-78a); Hasselman, *supra* note 4, at 193 and n.309 (*Public Citizen* "suggests the opposite outcome from the one reached by the *Defenders* majority. If the agency lacked authority under the CWA to deny a transfer application, then its decision would not be the 'cause' of any harm that resulted. The [*Defenders*] court did not explain this apparent contradiction.").

This Court's unanimous *Public Citizen* opinion reversed *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003). The Ninth Circuit does not seem to have acceded to the notion that but-for causation (*e.g.*, but for a mandatory federal permit, a privately initiated action could not occur) is not sufficient in many statutory settings.

[9] *See* Fed. Pet. at 11 ("Section 7(a)(2) thus does not impose upon federal agencies any affirmative duty to protect listed species from harms caused by other actors, such as a state permittee."). The ESA Section 7 causation issue has strong parallels to a significant causation issue under another ESA section. *Sweet Home* established a "proximate cause" limit on ESA Section 9 "take" liability. Despite this, a few lower courts have interpreted "take" broadly in a fashion making State and local governments liable for any "takes" committed by a private party whose actions are reviewed by a governmental agency for some non-ESA purpose. Law review commentary suggests such liability should not exist under a causation analysis. Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental* Regulation, 90 IOWA L. REV. 377, 429-30 (2005);

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This Court's precedents support that a governmental exercise of regulatory authority constrains, but does not "authorize," private land uses. Instead, the private property owner has the initial right to develop the property under Fifth Amendment jurisprudence. *E.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-17; Rasband, *supra* note 9, at 626. Additionally, this Court has found that partial federal funding and oversight of a State program do not federalize those State actions. *Forsham v. Harris*, 445 U.S. 169, 178-80 (1980); *United States v. Orleans*, 425 U.S. 807, 816-18 (1976). Similarly, the "mere fact that a business is subject to state regulation does not by itself convert its [private] action into that of the State for purposes of" State action under the Fourteenth Amendment. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). Those decisions embody the

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James Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 623-28 (2003). Other law review articles explain why making a regulatory agency responsible for any " takes" committed in a privately initiated action cannot be reconciled with the structure of the ESA or with federalism principles in the Constitution. Valerie Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations Under the ESA*, 45 NAT. RESOURCES J. 103 (2005); J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RESOURCES & ENV'T 70 (ABA Fall 2001); Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L. J. 423, 438-54 (2000).

The Ninth Circuit's notion that a federal agency with certain limited permitting authority is a legally culpable cause of impacts directly caused by privately initiated projects has a substantial overlap with the "vicarious ESA liability" notion discussed in those articles. The Court's guidance could well resolve both pressing issues.

common sense principle that the person proposing and conducting the action is the legally relevant cause of that action's impacts, but more distant regulators (whose scope of authority is often limited) are not legally relevant causes.

The rationale of the court below on causation is in tension with those precedents. The Ninth Circuit's ruling makes EPA's transfer of CWA permitting authority the "cause" of all effects that may flow from future privately initiated actions that involve discharges requiring State NPDES permit authorization.[10] Yet, because ESA Section 7(a)(2) addresses only the impacts of federal actions (not State-approved private actions) and because CWA Section 402(b), 33 U.S.C. § 1342(b), limits EPA's legal authority, the answer should be that EPA is not the legal cause of the private impacts "the agency has no [CWA] authority to prevent." *Public Citizen*, 541 U.S. at 767; *see Am. Forest & Paper Ass'n*, 137 F.3d at 298-99; Fed. Pet. at 11-13; NAHB Pet. at 27-29.

In sum, the causation issue warrants review. The Ninth Circuit's ruling is at least in tension with Supreme Court authority, and the court's rationale conflicts with the Fifth Circuit's analysis in *Am. Forest & Paper Ass'n*, 137 F.3d at 298-99. Issues regarding who or what is the legally relevant cause of impacts for ESA Section 7 purposes, and on the

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[10] Because the CWA only provides jurisdiction over water quality issues within waters of the United States, the CWA provides no authority for EPA to control private land uses on uplands (including farms) that may affect listed species. *See* Fed. Pet. at 4 note 1; *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000); *Natural Res. Def. Council v. United States Envtl. Prot. Agency*, 859 F.2d 156, 169-71 (D.C. Cir. 1988); *Save the Bay, Inc. v. United States Army Corps of Eng'rs*, 610 F.2d 322, 326 (5th Cir. 1980).

scope of impacts considered in assessing ESA Section 7 compliance, are recurring issues of considerable significance.

5. We urge the Court to grant the Petitions to relieve the adverse impacts that conflicting lower court precedents have on the broad spectrum of private individuals and businesses who rely on timely federal grants, permits, and services. The conflicting case law creates adverse impacts in the following areas.

First, the legal uncertainty spawned by the divergent lower court authorities creates economic inefficiencies. The absence of a clear rule invites greater litigation and produces arbitrarily disparate results.[11]

Delays are a second major area of adverse impacts. There are delays in delivering federal services if the ESA Section 7(a)(2) consultation process is needlessly engaged in the face of legal uncertainty, or if there is litigation challenging the alleged lack of ESA Section 7(a)(2) compliance. A timely federal check or permit can be the difference between survival and bankruptcy or closure for a farm or any other business.

A third set of adverse impacts is the inability to provide needed federal services or permits at all if a court – following one of several available lines of precedent – concludes that ESA Section 7(a)(2) is an overriding authority and that a particular federal action (although mandated under other laws) does not substantively comply with

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[11] This, in turn, impairs public faith in the judicial system, which necessarily suffers where the perception is that any given judge or panel may simply select one or another line of precedents that suits its world view.

Section 7(a)(2). This may happen with greater frequency in the future under the ruling below and similar rulings. The ESA Section 7(a)(2) constraint against adversely modifying critical habitat has the potential to prevent many more federally assisted actions now that: (1) *millions of acres* have been designated as critical habitat for numerous species (*see* 50 C.F.R. §§ 17.95 and 17.96); and (2) some courts have held that adverse modification of critical habitat is subject to a more stringent "recovery"-based standard than is provided for in current rules.[12] To prevent unwarranted shutdowns of important federal programs under the Ninth Circuit's view of ESA Section 7(a)(2), the Court should accept review and provide guidance on when ESA Section 7(a)(2) does and does not apply.

6. A particularly pernicious effect of the Ninth Circuit's view of ESA Section 7 is that it thwarts the will of Congress as expressed in other statutes. In numerous statutes, Congress has directed a federal agency to do X (*e.g.*, issue a permit, grant money, provide insurance or compensation) if particular conditions are satisfied. The Ninth Circuit's view that ESA Section 7(a)(2) adds procedural prerequisites, and even may prohibit otherwise mandatory federal action, frustrates the legislative objectives of the other statutes.

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[12] *E.g., Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1069-77 (9th Cir. 2004). Further, some lower courts have found that federal agencies have a difficult burden in meeting the ESA Section 7(a)(2) duty to "insure" that a federal action is "not likely to jeopardize the continued existence of a" listed species. *Washington Toxics Coal.v. United States Dep't of Interior*, 2006 WL 2469119 at *17-28 (W.D. Wash. decided Aug. 24, 2006).

For example, the CWA has a federalism objective that States take the lead in regulating the water quality impacts of private land uses. 33 U.S.C. 1251(b); *Rapanos v. United States*, 126 S. Ct. 2208, 2215, 2223-24 (2006); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 166, 172-74 (2001). In the CWA, Congress did not condition the transfer of Section 402 permitting authority to States on any (continuing) federal role under ESA Section 7(a)(2). *See* NAHB Pet. at 3-4, 9-14. The Ninth Circuit's view, however, frustrates the CWA's federalism objective, as well as the similar ESA Section 6 objective (16 U.S.C. 1535) of voluntary State cooperation on ESA matters. *See* Fed. Pet. at 10-12.

7. America's producers of food and fiber have suffered particular harm resulting from the Ninth Circuit's view of ESA Section 7 as superseding all other laws. Earlier in 2005, another Ninth Circuit panel used similar rationales in *Washington Toxics Coal v. United States Envtl. Prot. Agency*,, 413 F.3d 1024 (9th Cir. 2005). There, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") specified the standards and procedures for temporarily suspending a pesticide use due to ESA concerns. 7 U.S.C. 136(l) and 136d(c). Nonetheless, the Ninth Circuit held that ESA Section 7(a)(2) overrode any such limitations on EPA's or the court's authority. 413 F.3d at 1031-35.

The result was that certain uses of pesticides to help produce food and fiber for the American public were banned by a court injunction. The injunction is inconsistent with the careful balancing of environmental and food production goals in FIFRA. This is but one example in which the same rationale expressed by the court below has had and will continue to have adverse effects on farming.

Phase two of the *Washington Toxics* saga has involved continuing litigation over the federal agency efforts to develop rational means of implementing these expansive Section 7 obligations in the context of pesticide approvals. After the first *Washington Toxics* case created the specter of many suits to limit uses of particular pesticides until lengthy ESA Section 7 consultation was completed, the responsible federal agencies sought to streamline the ESA Section 7 compliance process for pesticide registration. The agencies did so by adopting so-called ESA Section 7 counterpart rules. *See* 69 Fed. Reg. 47,732 (Aug. 5, 2004). One innovation under those rules was to eliminate the delay of obtaining U.S. Fish and Wildlife Service concurrence, in informal consultation under 50 C.F.R. § 402.13, when EPA alone concludes that a pesticide action is not likely to adversely affect (let alone jeopardize the existence of) a listed species.

This key innovation was recently struck down in *Washington Toxics Coal v. United States Dep't of Interior*, 2006 WL 2469119 (W.D. Wash. decided Aug. 24, 2006), *appeals pending*. Prominent in the district court's analysis was the Ninth Circuit's ruling below that ESA Section 7 requires consultation with the relevant Service as a prerequisite to any and all federal actions. The counterpart rules were found unlawful for eliminating this mandatory consultation for some subset of agency actions. *See* 2006 WL 2469119 at *13-14, quoting from *Defenders*, 420 F.3d at 961 (Fed. App. 26a).

Thus, the decision below is being interpreted in ways that impair the ability of American farmers to provide food and fiber to serve domestic and international needs. This further illustrates why, in light of the significant consequences of the Ninth Circuit's ruling to both the public

sector and the private sector, the ruling warrants review by this Court.

8. Accepting review would provide the Court with an opportunity to clarify that certain *dicta* in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*"TVA v. Hill"*), do not control the scope of ESA Section 7(a)(2) *vis a vis* other statutory duties. That famous case involved the snail darter and the Tellico Dam. The tea leaves from the *TVA v. Hill* opinion have greatly influenced the treatment that ESA claims have received in the years since in lower courts. For example, many lower courts cite *TVA* as demanding substantive injunctions even for violations of ESA Section 7 procedures and as requiring that listed species receive the benefit of any doubt created by man's incomplete scientific knowledge. *E.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 792-800 (9th Cir. 2005); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126-30 (9th Cir. 1998).

The panel below relied heavily on *TVA v. Hill* as supporting the conclusion that ESA Section 7(a)(2) overrides the limitations on an agency's authority as articulated in any other statute. 420 F.3d at 964-66 (Fed. App. 32a-38a). Yet, *TVA v. Hill* concerned the remedy for an admitted substantive violation of ESA Section 7, and Federal Petitioners did not contend that TVA lacked statutory authority to not close the dam gates. *See* 437 U.S. at 171-73, 193-95; Hasselman, *supra* note 4, at 137 ("The Supreme Court never specifically addressed the question of whether TVA had the 'discretion' to not finish the dam. Nor did such an argument play a prominent role in the briefing before the court.").

Further, *TVA v. Hill* addressed the special rule that the legislative intent of an appropriations act cannot override a

substantive statute like ESA Section 7. 437 U.S. at 189-93. *TVA v. Hill* did not address the issue here of what happens when two substantive statutes (CWA Section 402(b) and ESA Section 7(a)(2)) are in apparent conflict. *See* NAHB Pet. at 23. "*TVA*, which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out purposes of the ESA, is hardly authority to the contrary." *Platte River*, 962 F.2d at 34 (D.C. Cir. 1992). It is "contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 n.5 (1992).

TVA v. Hill does contain some conflicting *dicta*. This includes quotations supporting a legislative intent that ESA Section 7 operates only within the limits of an agency's other legal authorities:

> "The subsection requires...*agencies to use their authorities*...[to] take the necessary action that will not jeopardize the continued existence of listed species."... H.R. Rep. No. 93-412, p. 14 (1973).... [T]he House manager of the bill, Representative Dingell, provided an interpretation of the Conference bill... "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to *take steps within their power* to carry out the purposes of this act...." 119 Cong. Rec. 42913 (1973).

437 U.S. at 182-84 (emphasis added). More generally, Amicus agrees with the Solicitor General's and NAHB's analyses that, when the history of ESA Section 7(a)(2) is examined thoroughly, it supports the view in 50 C.F.R. 402.03 that ESA Section 7(a)(2) is supplemental and

operates within the confines of an agency's authority under its organic laws. *See* Fed. Pet. at 13-18; NAHB Pet. at 16-18.

Thus, review should not be declined on the unpersuasive basis that *TVA v. Hill* settles the scope of ESA Section 7(a)(2), but rather should be granted to clarify the dicta of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Petitioner,
v.
DEFENDERS OF WILDLIFE, ET AL.
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
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On Writs Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE THE AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION AND THE NATIONWIDE PUBLIC PROJECTS COALITION IN SUPPORT OF PETITIONERS

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The American Road and Transportation Builders Association and the Nationwide Public Projects Coalition, as *Amici curiae*, respectfully submit this brief in support of Petitioners National Association of Home Builders and U.S. Environmental Protection Agency ("EPA").[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are private entities, public sector agencies, associations, and local governments that provide essential public services covering transportation, flood control, water supply, and waste water management.

Amici and their member organizations would be hard-hit if the Ninth Circuit decision is affirmed. The ability of *Amici* to timely meet essential public needs could be severely harmed if public agencies must assess the speculative future land use effects of potential development on listed species in order to meet the "insure" mandate under Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. 1531 *et seq.* The implications of upholding the Ninth Circuit would extend far beyond the Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342, program transfer to Arizona at issue in this case, and will impact federal agency actions necessary for many vital public works projects across the nation.

The *Amici* consist of the following:

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[1] All parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel have made a monetary contribution to the preparation and submission of this brief.

The American Road and Transportation Builders Association ("ARTBA") is made up of more than 5,000 member organizations in the transportation construction industry, including construction contractors; professional engineering firms; federal, state, and local transportation administrators; heavy equipment manufacturers; and materials suppliers. These member companies employ more than 2.5 million people in the transportation construction industry in the United States. ARTBA's members are responsible for construction of vital public infrastructure projects such as highways, bridges, airports, railroads and mass transit facilities.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies involved in water supply, flood control, irrigation, wastewater and stormwater management, street and highway construction and maintenance, and environmental quality amenities. These agencies represent over 12 million constituents, extending from Connecticut to California, and from Alaska to Georgia. NPPC works on behalf of members of the public to ensure that vital public infrastructure services are provided in a safe, timely and environmentally-beneficial fashion. Consisting of public agencies and firms that provide vital infrastructure and services, NPPC's members must ensure that a responsible balance is achieved between environmental, health, and safety goals and the protection of human lives and property. NPPC members often encounter ESA issues in providing these services. NPPC's members are typified by the following agencies:

1) **The Metropolitan Denver Water Authority** ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of twenty cities and special districts that provide municipal water

and/or wastewater services for the metropolitan Denver area and serve more than 1.5 million persons. MDWA's member agencies serve some of the fastest-growing counties in the nation.

2) **The Consolidated Mutual Water Company** ("CMWC") is mutually owned, and serves an estimated population of 100,000 people in Jefferson County, Colorado, in the western region of Metropolitan Denver. CMWC acquires its water supply from lakes and streams.

3) **Rancho California Water District** ("RCWD") provides water and sewer service over a 150 square mile area in southwestern Riverside County, California. Thousands of residents and businesses rely on RCWD for potable water. The ESA has delayed and driven up costs on numerous capitol improvement projects undertaken by RCWD.

4) **The Cobb County-Marietta Water Authority** ("CCMWA") is a political subdivision of the State of Georgia. CCMWA is a regional water wholesaler that supplies water to municipalities and counties serving more than 780,000 people in the rapidly growing Metro-Atlanta area. Included are all of Cobb County and its municipalities, all of Paulding County, and portions of Douglas County, Cherokee County, and Fulton County.

5) **The West Valley Water District of Rialto, California** ("WVWD") is an independent special district that serves water customers living in southwestern San Bernardino County and northern Riverside County. WVWD depends on local surface water resources, five groundwater basins and the California State Water Project to meet the needs of more than 50,000 persons.

SUMMARY OF ARGUMENT

1) The Ninth Circuit's misapplication of *Public Citizen* with respect to EPA's duty under Section 7(a)(2) of the ESA improperly requires that agency to speculate on future impacts to listed species from development. Because EPA's NPDES authority is limited to the regulation of discharges into navigable waters—not land development—the CWA may not be interpreted to require the Agency to address the potential consequences far removed from its scope of authority in order to meet the "insure" duty under Section 7(a)(2). In essence, the Ninth Circuit's ruling would transform the CWA into a "super land use" control statute to achieve the goals of the ESA. Nothing in this Court's 1978 decision in *TVA v. Hill* allows for such an expansion of an agency's organic authority to further ESA's goals.

2) The Ninth Circuit's adoption of the "but for" test distorts the tort principle of "proximate causation." The Ninth Circuit's rationale would so expand the scope of effects that must be considered under Section 7(a)(2) as to require federal agencies to speculate regarding the unforeseeable consequences of agency actions on local development activities. The effect of the decision would be to undermine the principles of proximate causation endorsed by this Court in *Sweet Home*, *Public Citizen*, and *Metropolitan Edison* with respect to the ESA and NEPA.

3) The Ninth Circuit's rationale, if upheld, will extend far beyond EPA's CWA transfer action at issue in this case. If ESA considerations are found by the Court to expand federal agencies duties beyond the limits of their discretionary authorities, those agencies will be required to speculate as to the impact of future development on the siting of important public projects. The result will be a significant increase in costs and delays for vital projects,

such as much needed highway improvements, that could compromise essential safety and environmental needs.

ARGUMENT

I. THE NINTH CIRCUIT'S ADOPTION OF THE "BUT FOR" CAUSATION TEST INTERPRETING *PUBLIC CITIZEN* WOULD TRANSFORM THE ESA INTO A "SUPER" LAND USE CONTROL LAW.[2]

The Ninth Circuit misapplied *Department of Transportation v. Public Citizen*, 541 U.S. 752, (2004), in concluding that the requirement of Section 7(a)(2) of the ESA for agencies to "insure" that actions do not result in "jeopardy" or "adverse modification of [critical] habitat" makes private land use activity an "effect" of EPA's action to approve Arizona's assumption of the NPDES permit program. This adoption of a "but for" test distorts the *Public Citizen* ruling and elevates the ESA into a "super" land use control statute.

A. The Ninth Circuit's Decision Distorts *Public Citizen*.

This Court in *Public Citizen* squarely and unanimously rejected the "but for" causation test in construing the scope of effects that must be considered under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Examining whether NEPA required the Federal Motor Carrier Safety Administration ("FMCSA") to consider the effects of a rule imposing registration and safety

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[2] While the Court certified four questions, and requested all parties to brief a fifth question, this brief addresses only the following question: Did the Ninth Circuit incorrectly apply the holding of *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), in concluding that EPA's approval of Arizona's NPDES permitting program was the legally relevant cause of impacts to endangered species resulting from future private land use activities?

requirements on Mexican domiciled motor carriers operating in the United States, the Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen,* 541 U.S. at 770. There, FMCSA did an Environmental Assessment under NEPA focusing on those effects that were "likely to arise from the increase in the number of roadside inspections of Mexican trucks and buses," *id.* at 761, but "did not consider the environmental impact that might be caused by the increased presence of Mexican trucks in the United States." *Id.* at 752. FMCSA concluded that it lacked the discretion to prevent the entry of Mexican trucks into the United States since the decision to allow entry flowed from the President's Executive Order to lift a long-standing moratorium and that of Congress in granting the President such authority while simultaneously limiting FMCSA's discretion. *Id.* at 766. In upholding FMCSA's decision, the Court adopted the "familiar doctrine of proximate cause from tort law" in holding that a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. *Id.* at 767. *See also, Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (NEPA requires "a reasonably close causal relationship" between the environmental effect and the alleged cause).

Here, while the Ninth Circuit correctly recognized the *Public Citizen* principle of "legally sufficient" causation, the court then proceeded to completely misapply that principle in holding that Section 7(a)(2)'s "insure" language imposed a duty on EPA to conduct a far reaching analysis of the impact of development projects on ESA-listed species that may be dependent on state issuance of NPDES permits. "Neither the [U.S. Fish and Wildlife Service, ("FWS")] nor the EPA makes any argument that justifies the Biological

Opinion's failure to analyze, in detail, the likely effect of such future development projects fostered by pollution permits on specific species." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 973 (9th Cir. 2005). By imposing such a requirement, the court essentially mandated EPA to require detailed consideration of how a state's assumption of the 402 NPDES program would become the "catalyst" of a series of land use impacts far removed in time and space from issuance of NPDES permits by the State. EPA would be forced to "crystal ball" land use impacts that may occur in the future such as assessing local development plans for upland projects that have little if any relationship to discharges of pollutants into navigable waters.[3] As we discuss below, this misapplication would especially affect many public works projects such as federally funded highway construction that may facilitate development at some point in the future.

B. ESA Section 7(a)(2) Does Not Authorize the Kind of Deviation from the *Public Citizen* Ruling Adopted by the Ninth Circuit Here.

The Ninth Circuit latches on to the "insure" language of Section 7(a)(2) as creating a substantive duty that required EPA and FWS consultation to consider far-reaching development projects that are "interrelated or interdependent" with the discharge permitted by the permit. *Defenders*, 420 F.3d at 951, 972-973. However, the fact that Congress created a duty on agencies to "insure" against such harm to listed species does not expand the underlying authority of a federal action agency to engage in such analysis. Private land use activities are not "caused" by the

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[3] The states still without NPDES authorization include: Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico. U.S. Envtl. Prot. Agency, State Program Status, *available at* http://cfpub.epa.gov/npdes/statestats.cfm.

EPA decision to transfer the NPDES program to Arizona and therefore cannot be an "effect" of that decision. Moreover, the "substantive/procedural" distinction that the lower court adopts between the ESA and NEPA does not somehow expand the "effects" analysis that EPA may consider in making a transfer decision. When EPA and FWS consult under Section 7 regarding issuance of an NPDES permit, that consultation is limited to effects within the "action area" limited by the water body receiving the discharge and downstream areas—not some unrelated land use activity. *See* 50 C.F.R. § 402.02 ("Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action"). *See also*, *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985)(Corps considered how decreased water flow would hurt the endangered whooping cranes because the agency "is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing").

The principles set forth by the D.C. Circuit regarding EPA's NPDES permitting authority and NEPA are equally applicable to the CWA/ESA interface. The D.C. Circuit squarely held that NEPA does not expand EPA's administration of the NPDES permit program to require regulation of the underlying activity as opposed to the effects of the discharge itself. The court overturned an EPA regulation that would ban the construction of a new industrial source pending issuance of a discharge permit. *Natural Res. Def. Council v. EPA*, 822 F.2d. 104, 128 (D.C. Cir. 1987)("Until the private owner applies for a discharge permit, then, EPA lacks authority to regulate the owner's activities under NEPA and the Clean Water Act. EPA's construction ban thus seems directly contrary to Congress' clear intent, as elucidated by the expressly limited statutory definition of 'major Federal action'"). In a follow-up

decision, the court concluded that "neither the Clean Water Act nor NEPA authorizes EPA's imposition of non-water quality permit conditions." *Natural Res. Def. Council v. EPA*, 859 F.2d. 156 (D.C. Cir. 1988). The court admonished EPA to not use NEPA to "transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities themselves. To do so would unjustifiably expand the agency's authority beyond its proper perimeters." *Id.* at 170. The court then noted that "the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants. Thus, just as EPA lacks authority to ban construction of new sources pending permit issuance, so the agency is powerless to impose permit conditions unrelated to the discharge itself." *Id.*

The Ninth Circuit's decision ignores these principles. The court's attempt to distinguish the ESA from NEPA does not provide a basis to expand the factors EPA must consider under CWA Section 402(b) to encompass far-reaching land use impacts of activities permitted under the NPDES permit program. While courts have held that NEPA is essentially a procedural statute[4], Congress did direct federal agencies to strive to achieve certain substantive goals. Section 101 of NEPA requires the federal government to use "all practicable means and measures" to protect environmental values. Sec. 101(a), 42 U.S.C. § 4331(a).[5]

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[4] *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) and *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (NEPA's mandate to the agencies is "essentially procedural").

[5] The other main goal of Section 101 calls for the Federal Government "to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may

(1) fulfill the responsibilities of each generation as trustee of the

Courts have recognized NEPA's goals. *See Concerned about Trident v. Schlesinger*, 400 F. Supp. 454, 480 (D.D.C. 1975) ("Section 101, in effect, sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment and declares NEPA's basic substantive policies")(internal citations omitted). *See also, Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs*, 470 F.2d 289, 297 (8th Cir. 1972)("The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision-making"). These obligations to integrate environmental factors into the decision-making process are no less significant than those imposed by ESA with respect to the responsibilities of federal agencies. Yet, as *Public Citizen* and other cases have recognized, those responsibilities can only be exercised within the limits of an agency's discretion set forth by Congress; any effects analysis must be directly related to an agency's enabling authority.

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environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

Sec. 101(b), 42 U.S.C. § 4331(b).

Under the Ninth Circuit's interpretation of *Public Citizen*, the reach of an agency's duty to assess indirect effects would become unlimited. The Ninth Circuit's reliance on *TVA v. Hill*, 437 U.S. 153 (1978), to justify such a result is completely misplaced. The effects analysis in *Hill* resulting in the Court's sweeping language that the Section 7 "insure" command "admits of no exceptions" does not in any way justify expanding the express factors in Section 402(b) of the CWA to reach the kind of land use impacts discussed by the court below. *Hill* dealt with the direct effects of the Congressionally authorized Tellico Dam project on the aquatic habitat of the snail darter where the undisputed evidence showed that the completion of that dam would result in jeopardy to that species. The Court recognized the close causal relationship between the construction of the dam on the Tennessee River and the habitat of the snail darter within the river.[6]

The legislative history of the ESA analyzed by the Court at length in *Hill* reveals a key principle: while the Section 7 duties were intended by Congress to be imposed on each federal agency, that duty was not unlimited; agencies would have to exercise that duty within the confines of their underlying authority. As the *Hill* Court noted in quoting from Representative Dingell's comments on the Conference Report, "[Section 7] substantially amplifies the obligation of [federal agencies] to take steps **within their power** to carry out the purposes of this act." *Hill*, 437 U.S. at 183 (emphasis added). That qualifier is essential to understanding the limits of the reach of "effects" that the ESA obligates EPA (and for that matter, any other federal

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[6] "[T]he snail darter apparently lives only in that portion of the Little Tennessee River which would be completely inundated by the reservoir created as a consequence of the Tellico Dam's completion." *Hill*, 437 U.S. at 161.

agency) to address. That limitation has been consistently followed by the FWS in developing regulations governing the Section 7(a)(2) duties of federal agencies. *See, e.g.*, Interagency Cooperation--Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,937 (June 3, 1986) (codified at 50 C.F.R. Part 402)("These counterpart regulations would allow individual Federal agencies to 'fine tune' the general consultation framework to reflect their particular program responsibilities and obligations"). Other Circuit Courts have recognized these limits. *See Sierra Club v. Glickman*, 156 F.3d. 606, 616 n.5 (5th Cir. 1998)(the "duty to consult [under Section 7(a)(2)] and the duty to conserve [under Section 7(a)(1)] is tempered by the authorities of each agency"); *Riverside Irrigation Dist.*, 758 F.2d. at 512 (the ESA "does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the Clean Water Act").

In fact, the record below reflects FWS and EPA's joint understanding that the "effects" analysis for EPA's transfer action under Section 402(b) does not reach the private development activities that may impact upland habitat of listed species within Arizona such as the pygmy owl. The FWS Biological Opinion clearly states that the loss of the Section 7 consultation following Arizona's assumption of the NPDES program will not be the legally sufficient cause of increased development:

> Developments are driven by any number of factors, including but not limited to demand, supply economics, political decisions, zoning regulations and financial market stability. Based upon the best available information, development in the action area will not be caused by EPA's proposed approval . . . We believe that the assumption of the program by

> the State of Arizona will not cause development, and concur that EPA's CWA-mandated approval of the program has only an attenuated causal link to the reduction in Federal ESA conservation responsibilities.

U.S. Fish and Wildlife Service Biological Opinion 21-23 (Dec. 3, 2002), *available at* http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/020268_EPA_approval_of_AZ_AZPDES.pdf. This interpretation was further clarified in an exchange of letters between EPA and FWS in October, 2006.[7] FWS's historic interpretation along with its specific application in consulting over the EPA's Section 402(b) actions undermines the Ninth Circuit's rationale that such indirect land use effects must be considered by the agency.

Finally, not only would imposing such a duty exceed the CWA and ESA obligations, it would undermine the "cooperative federalism" inherent in the CWA. The CWA specifically limits the authority of federal agencies to intrude into state and local matters. CWA Section 101(b)("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources"). The Ninth Circuit's reasoning would undermine these federalism principles. EPA would be forced to speculate on the future land use impacts on the habitat of an ESA-listed species from virtually any development that may at some point in the future require a State NPDES permit. This would necessarily require EPA to assess and perhaps override local zoning and planning decisions that may be enabled by such

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[7] The agencies involved with the ESA have now clearly determined that ESA Section 7(a)(2) does not apply to CWA Section 402(b). *See* EPA Pet. App. 93a-102a (App. C), 103a -110a (App. D), 111a – 116a (App. E).

permit decisions. In effect, EPA would become the "land use czar" for any development that may impact a listed species within a state seeking to assume the NPDES program. That result is clearly not what Congress intended when it enacted both the CWA and the ESA.

II. IF UPHELD, THE NINTH CIRCUIT'S RATIONALE WOULD SO EXPAND THE SCOPE OF EFFECTS THAT MUST BE ADDRESSED UNDER SECTION 7(A)(2) OF THE ESA SO AS TO CONFLICT WITH THE PRINCIPLE OF PROXIMATE CAUSATION ENDORSED BY THE SUPREME COURT IN *SWEET HOME*, *PUBLIC CITIZEN*, AND *METROPOLITAN EDISON*.

A. The Tort Principle of Proximate Causation Is Not the Same as Factual Causation.

The Ninth Circuit's adoption of the "but for" test undermines the long standing common law principle of "proximate causation" that has been repeatedly adopted by this Court in construing the scope of effects that must be considered under various federal environmental statutes. "Proximate cause" is the not the same as "but for" factual cause. It is "not about causation at all but about the appropriate scope of responsibility." Dan B. Dobbs, *The Law of Torts* 443 (2000). The lessons from the classic *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928), illustrate the importance of this legal principle. Every student who has taken Torts 101 knows the *Palsgraf* story: A passenger boarding a train slips; a railroad employee tries to help but causes the passenger to drop a package; the package contained fireworks which exploded with enough force to knock the scales at the other end of the platform down on the unlucky Mrs. Helen Palsgraf. Though she won

her claim for negligent damages in the jury trial, she lost upon appeal: the railroad employee was not liable because his actions were too remote from the final effect. *Palsgraf* epitomizes how one is liable only for the harm or injury that is foreseeable—"the orbit of the danger as disclosed to the eye of reasonable vigilance." *Id.* at 343.

The Ninth Circuit's rationale would stand *Palsgraf* on its head. All federal agencies conducting ESA consultations with the FWS (not just EPA under CWA Section 402(b)), would be responsible for the unforeseeable, undefined future results of their actions on listed species or face liability under the ESA. In effect, an undefined chain of events could increase the scope of the ESA liability for years to come.[8] Public sector agencies represented by your *Amici* and that are responsible for building the nation's infrastructure and transportation systems would find it very difficult to obtain ESA clearance because of the endless, infinite harms that could occur in the distant future, even where those agencies have no control over the decisions that may result in such impacts. Rather, as it has done in the past, this Court should use proximate cause as the controlling limitation on liability. As Judge Andrews said in his well known *Palsgraf* dissent: "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Palsgraf* at 352 (Andrews, dissenting).[9]

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[8] Section 7 incidental take statements protect federal agencies from Section 9 liability: "any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned." ESA Section 7(o)(2).

[9] In addition to being practical, proximate cause supports justice. As one legal scholar noted:

> The separation of proximately-caused consequences

B. Courts Have Adopted Proximate Causation Principles Under the ESA, Just as They Have Done Under NEPA and the CWA.

This Court has recognized that the ESA does not alter or modify proximate causation principles. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995), the Court specifically addressed proximate causation in a facial challenge to the validity of the FWS "harm" regulation, to the extent that it prohibited habitat modification as a taking under Section 9.[10] Justice O'Connor gave two reasons for concurring with the Court's upholding of the FWS's definition of "harm": (1) because it "is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals," *id.* at 708-709; and (2) the regulation's application "is limited by ordinary principles of proximate causation, which introduce notions of foreseeability." *Id.* at 709. Importantly, she saw "no indication that Congress . . . intended to dispense with ordinary principles of proximate causation. Strict liability . . . does not normally mean liability for every consequence,

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> from the broader universe of actually-caused consequences is a policy-driven process that asks whether the resultant harms are so clearly outside the risks [a defendant] created that it would be unjust or at least impractical to impose liability.

Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-2004 Term* (Houston L. Rev., Summer 2005). Using proximate cause thus facilitates or expresses "a value judgment about the appropriate scope of liability . . . ." Dobbs, *supra*, at 447.

[10] The question in *Sweet Home* was whether the FWS's definition of "harm"—including the phrase, "significant habitat modification or degradation where it actually kills or injures wildlife," was facially invalid. *Sweet Home*, 515 U.S. at 687.

however remote, of one's conduct." *Id.* at 712.[11]

Subsequent ESA cases have built on *Sweet Home's* adoption of proximate causation as a limiting factor.[12] In *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229 (9th Cir. 2001), the court found that "it would be unreasonable for the Fish and Wildlife Service to impose conditions on otherwise lawful land use if a take were not reasonably certain to occur as a result of that activity." *Id.* at 1243. *See also, Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997)("when interpreting a term in a statute [like the ESA] which is, like 'cause' here, well-known to the common law, the court is to presume that Congress intended the meaning to be interpreted as in the common law").

Proximate causation has long been an accepted part of NEPA case law in assessing the scope of indirect effects that must be considered by federal agencies. When the *Public Citizen* Court noted that "NEPA requires 'a reasonably close causal relationship' akin to proximate cause in tort law," *Public Citizen*, 541 U.S. at 767, it relied heavily on this Court's previous analysis in *Metropolitan Edison Co.*, 460 U.S. at 775 (the potential of mental anxiety from restarting a nuclear plant "lengthens the causal chain beyond

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[11] Justice O'Connor analyzed *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), in terms of proximate causation to determine that it is not a take under ESA to permit mouflon sheep to eat mamane-naio seedlings that, when full grown, might have fed and sheltered endangered palila birds. "Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds." *Sweet Home*, 515 U.S. at 713-714.

[12] Legal commentators also used proximate cause-like analysis to point out that permitting is not the cause of development, and that land use authorizing agencies are not vicariously liable for Section 9 take. *See* J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 Nat. Res. & Env't 70 (Fall 2001).

the reach of NEPA"). These principles have been adopted by numerous courts over the years. *See e.g., City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005)("a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action").

These NEPA decisions have applied such principles in articulating a "rule of reason" standard in assessing the extent of effects that must be considered under that statute. As the D.C. Circuit has stated, "The starting point in any analysis of an agency's compliance with . . . NEPA is the 'rule of reason,' under which a federal agency proposing a major action must consider only the reasonably foreseeable environmental effects of the action." *Potomac Alliance v. U.S. Nuclear Regulatory Comm'n*, 682 F.2d 1030, 1035 (D.C. Cir. 1982).

Courts have particularly applied the principles of proximate causation in limiting the scope of speculative future effects that must be considered under NEPA.[13] For

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[13] *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976)(the mere contemplation of future action was not sufficient to require preparation of an environmental impact statement); *Sierra Club v. Marsh*, 976 F.2d 763, 768 (1st Cir. 1992)("Agencies must consider only those indirect effects that are 'reasonably foreseeable.' They need not consider potential effects that are highly speculative or indefinite"); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 81 (D.D.C. 2006)("The [NEPA process] must include, among other things, a detailed statement describing the reasonably foreseeable environmental impact[s]")(internal quotations omitted); *Okla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 1470, 1489 (N.D. Okla. 1988)("If, however, the effects cannot be readily ascertained and if the alternatives are deemed remote and only speculative possibilities, detailed discussion of environmental effects is not contemplated under NEPA"); *Fla. Keys Citizens Coalition, Inc. v. U.S. Army Corps of Eng'rs*, 374 F. Supp. 2d 1116, 1151 (S.D. Fla., 2005)("Any attempt to assess the cumulative impacts from such future projects would be pure speculation and is not required").

example, courts have held that NEPA review of federal aid highway projects need not always analyze the environmental effects of future segments that may be connected to the project under review. *Adler v. Lewis*, 675 F.2d 1085, 1096-1097 (9th Cir. 1982)(segmentation is suitable when four factors are met: "(1) the section must be as long as practicable to permit consideration of environmental matters on a broad scope, (2) the section must have independent utility, (3) the length of the highway selected must assure an adequate opportunity for the consideration of alternatives, and (4) the segment should fulfill important state and local needs").[14]

The official highway community, itself, operates with the understanding that it is not responsible for future effects:

> A transportation agency has no legal responsibility or authority to approve or direct the course of development, and usually other local or regulatory entities must take intervening actions before such development could occur. Therefore even when a "but for" relationship exists between a transportation project and development trends, a transportation project may not necessarily be the proximate cause of land use changes, pace or location of development and resultant environmental impacts. For a transportation project that has economic development as part of the project purpose, the causal relationship is made closer as a matter of policy, and land

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[14] *See also, Ctr. for Biological Diversity v. Fed. Highway Admin.*, 490 F. Supp. 2d 1175, 1190 (S.D. Cal. 2007)(three private development projects that were conditioned on a proposed federal project are not subject to federal NEPA requirements).

> use changes or future development may be considered as indirect impacts of the project.

Am. Ass'n of State Highway and Transp. Officials, *Indirect and Cumulative Impact Analysis* 19-20 (Jan. 2006), *available at* http://www.trb.org/NotesDocs/25-25(11)_FR.pdf. This same report reflects on the "tenuous" causal relationship between a transportation project and any resulting land use changes or increased development: "A complex interplay of intervening public and private actions must occur before development takes place; variables other than transportation, such as market demand, site suitability, capital availability, market feasibility, and regulatory controls, play a significant role in making development decisions." *Id.* at 20.[15]

C. Proximate Causation Principles Under ESA and NEPA are Equally Applicable to the ESA/CWA Interface.

The body of ESA and NEPA law adopting proximate causation principles is equally applicable to the ESA/CWA interface at issue in this case. There is no rational basis to justify the Ninth's Circuit's reliance on Section 7(a)(2)'s "insure" language to justify deviating from these principles when the *Sweet Home* Court clearly found that "proximate causation" provided a limitation in assessing Section 9 "take" liability under the FWS's "harm" definition regarding habitat modification. Section 7(a)(2)'s direction that the agency action should "insure" not to cause "jeopardy" or "adverse modification" of critical habitat, is no less important than Section 9's direction that agency action not cause a take of a

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[15] Indeed, connecting NEPA to the future effects of our nation's infrastructure is ultimately a policy decision. *Public Citizen*, 541 U.S. at 767 ("proximate cause analysis turns on policy considerations and considerations of the 'legal responsibility' of actors").

listed species. In fact, in the 1982 amendments, Congress expressly linked the two sections by creating an "incidental take" exception following Section 7 consultations and the development of "reasonable and prudent alternatives" in a FWS Biological Opinion. *See* ESA Section 7(b)(4)(iv).[16]

Indeed, just as there is no basis for deviating from these principles under the ESA, there is similarly no basis under the CWA. Courts have found that "limiting effects analysis" is consonant with its statutory language. In addition to the two National Resources Defense Council cases cited earlier, recent case law holds that the CWA "gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." *Water Keeper Alliance v. EPA*, 399 F.3d. 486, 505 (2d Cir. 2005).[17] *Water Keeper Alliance* supports *Amici's* reading that Congress did not intend Section 402 of the CWA to expand a permit agency's authority to make the issuance of NPDES permits by the state the "proximate cause" of private land use activity. Because EPA's NPDES program is primarily concerned with discharge permits—not future road building or land development—the CWA does not require the agency to

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[16] "Provision for incidental take permits exempting landowners from Section 9 was added to the ESA in order to give landowners not requiring federal permits the same opportunity to develop their property as those proceeding under Section 7." Robert Meltz, Congressional Research Service, *The Endangered Species Act and Private Property: A Legal Primer*, n.19 (Mar. 7, 1993), quoting House Conf. Rep. No. 304, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. Code Cong. & Ad. News 2860, 2870.

[17] Professor Lin, *supra* note 9, also commented that this Court, in a case regarding pollution of the Florida Everglades, "hinted at a role for tort causation" in allowing two arguments for consideration on remand (the Government's "unitary waters" argument, and the water district's "indistinguishable parts of the same water body" theory). Albert Lin at 614-15, citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

address potential consequences far removed from its scope of authority.

Clearly, the required cause-and-effect relationship between NPDES program approval, endangered species, and future development is simply lacking. For this Court to uphold the Ninth Circuit's decision based solely on some vision of what might happen in the future—something unrelated to EPA's 402(b) authority—would violate the *Sweet Home*, *Public Citizen*, and *Metropolitan Edison* principles. Since EPA cannot regulate land use activities including public works projects of your *Amici*—fundamentally state and local issues—the Ninth Circuit's decision expands the CWA without Congressional approval. Whatever tenuous link the 9th Circuit found between NPDES program approval and Section 7(a)(2) jeopardy, if any, is beyond the CWA and should therefore be rejected.

III. THE NINTH CIRCUIT'S RATIONALE, IF UPHELD, WILL EXTEND FAR BEYOND THE CWA ACTION AT ISSUE IN THE CASE AND WOULD HAVE SIGNIFICANT ADVERSE EFFECTS ON VITAL PUBLIC PROJECTS.

The ramifications of the Ninth Circuit's interpretation of the scope of Section 7(a)(2) consultation are significant. The Ninth Circuit's decision could severely impact the process of decision-making for many vital projects sponsored by your *Amici* by elevating ESA considerations above other factors that must be considered in the review of public works projects. The transportation planning process in which ARTBA and NPPC members must participate typifies these consequences. Regulatory and administrative efforts required by ESA regulations account for a significant part of the delays faced by transportation projects.

For example, ARTBA member projects in California have recently been delayed more than two years due to ESA concerns over the San Bernardino Kangaroo Rat. If the Ninth Circuit's reasoning is allowed to stand, the scope of the ESA will be greatly broadened. The statute will, in effect, become a "trump card" in relation to other environmental requirements of the transportation planning process. ESA considerations will have to be not only examined in terms of transportation construction projects, but also any future development that may be linked in the future to those projects. This type of prediction would be impossible to measure. As a result, transportation projects could face a substantial increase in ESA-related delays because planners would not be able to forecast indirect impacts to species caused by their projects.

According to a recent report by the U.S. Government Accountability Office ("GAO")[18], as many as 200 major steps are already involved in developing a transportation project. According to the same report, it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally funded highway project.[19] This process involves dozens of overlapping state and federal laws, including ESA implementation, NEPA, state NEPA equivalents, wetland permits, clean air conformity, etc. Often times these procedures mask disparate agendas or, at a minimum, demonstrate an institutional lack of interagency coordination that results in a seemingly endless string of delays.

A recent study by the U.S. Federal Highway Administration ("FHWA") found the time required to process environmental documents for large projects has

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[18] *GAO Testimony Before the Committee on Environment and Public Works, U.S. Senate*, GAO-02-1067T (Sept. 19, 2002).

[19] *Id.*

doubled over the past two decades.[20] In the 1970s, the average time for completion of an environmental impact statement ("EIS") was 2.2 years. Former U.S. DOT Assistant Secretary for Policy Emil Frankel recently reported that from 1999-2001 the median time for completing an EIS was 4.4 years.[21] However, delays in the transportation project environmental review and approval process are not only limited to large projects. According to FHWA, three percent of federally funded transportation improvement projects require an EIS; the remaining 97 percent require an environmental assessment ("EA")(6.5 percent) or a categorical exclusion ("CE")(90.6 percent).[22] A recent report conducted by the National Cooperative Highway Research Program stated:

> [D]elays in completing [EA and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs.[23]

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[20] U.S. Fed. Highway Admin., *Evaluating the Performance of Environmental Streamlining Development of a NEPA Baseline for Measuring Continuous Performance, available at* http://www.environment.fhwa.dot.gov/strmlng/baseline/section2.asp.

[21] Emil H. Frankel, Asst. Sec'y for Transp. Policy, U.S. Dep't of Transp., Statement Before the U.S. Senate Comm. on Env't and Pub. Works, Hearing on Project Delivery and Envtl. Stewardship (Sept. 19, 2002).

[22] U.S. Fed. Highway Admin. Report to Congress on Federal Highway Administration Streamlining Activities in 2003 (June 2004), *available at* http://www.environment.fhwa.dot.gov/strmlng/rtc0604rpt.asp.

[23] *Environmental Streamlining: A Report on Delays Associated with the Categorical Exclusion & Environmental Assessment Process*, Prepared for the AASHTO Standing Committee on Highways by TransTech Management under NCHRP contract number HR 20-7(129) (Oct. 2000).

According to the above report, 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs, and 81 percent reported similar delays involving EAs.[24] These delays triple average environmental review times for CEs—from about eight months to just under two years—and have more than doubled review times for EAs, from under 1.5 years to about 3.5 years.[25]

A prime example of the hurdles caused by complex regulation can be found in the case of U.S. 95 in Las Vegas, Nevada. This project involved widening an interstate highway from six to ten lanes. The project had already satisfied all of the necessary NEPA requirements and was under construction. However, a supplemental NEPA document was allowed to be introduced (a single air quality monitoring study modeled in Los Angeles, not Las Vegas) two years after the Record of Decision had been issued. This resulted in a nearly year-long work stoppage. Indeed, although these delays were caused by NEPA, had an ESA-listed species been impacted, the Ninth Circuit's reasoning that Section 7(a)(2)'s "insure" language elevated the ESA above other requirements would have most certainly led to even greater delays by requiring consideration of future speculative land use effects on listed species.

These potential consequences are best understood in light of the safety and environmental needs to be met by the U.S. 95 project. In the year 2002 alone, traffic congestion cost Las Vegas area residents and businesses $364 million and resulted in the additional consumption of 33 million gallons of motor fuel.[26] The segment of U.S. 95 at issue in

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[24] *Id.*

[25] *Id.*

[26] Texas Transportation Institute, 2004 Urban Mobility Report,

this case serviced and accessed some of the fastest growing neighborhoods in Las Vegas. An estimated 190,000 vehicles traveled through the portion of U.S. 95 to be widened each day, with peak hour traffic reaching as high as 11,900 vehicles.[27] Traffic congestion slowed commuters to one-half of the 55 mile-per-hour speed limit on the corridor.[28] Also, between 2000 and 2002 there were 3,535 motor vehicle crashes on one section of U.S. 95.[29] In its present state, the U.S. 95/I-95 interchange in Las Vegas has been rated as one of the 25 "worst bottlenecks" in the United States.[30] The improvements that make up the U.S. 95 widening project are needed in order to keep pace with the rapid population growth currently being experienced in the Las Vegas area and prevent the effects of traffic congestion from worsening.

The widening of U.S. 95, once completed, will lead to enormous environmental, public health and safety benefits. Once finished, the improvement of U.S. 95 will result in a significant reduction in so-called "greenhouse gasses." Specifically, there will be a 58.8 ton reduction in carbon monoxide emissions, a 54.3 ton reduction in volatile organic compounds, and an 87.8 ton reduction in carbon dioxide emissions between now and the year 2025.[31] Further, it is estimated that within that time span there will be an 87.8% reduction in motor fuel usage by U.S. 95 commuters, which translates to 231,654,731 gallons of motor fuel saved (or 68.9 gallons per commuter over the life of the project).[32] Also, the time Las Vegas commuters spend stuck

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Performance Measure Survey for Las Vegas, 2 (Sept. 2004).

[27] U.S. Fed. Highway Admin., Press Release, Sept. 30, 2004.

[28] *Id.*

[29] *Id.*

[30] Cambridge Systematics, Inc., *Unclogging America's Arteries, Effective Relief for Highway Bottlenecks* - study conducted for American Highway Users Alliance, 3 (Feb. 2004).

[31] *Id.* at 63.

[32] *Id.*

in traffic will decrease by an average of 86.5%, which for commuters who use U.S. 95 twice per day, would mean 30 minutes of time saved daily while driving through the area to be improved.[33] Finally, the U.S. 95 improvements are projected to result in 3,524 fewer total motor vehicle crashes, 14 fewer fatalities, and 1,730 fewer injuries to commuters through 2025.[34]

These examples demonstrate the types of problems caused by delaying transportation and other public works projects. These problems will only be exacerbated if the Ninth Circuit's reasoning is allowed to stand and the ESA's "insure" language transforms the already extensive and time consuming review process into a requirement to treat ESA goals above all other considerations. Planners will be forced to account for effects on species that they have no feasible way of being able to project. The ESA will become the driving force behind a review process driven more by speculation over future land use impacts on species habitat than scientific certainty governed by reason.

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[33] *Id.*

[34] *Id.* at 62. Delays in the environmental review and approval process for transportation improvement projects can have tragic consequences. According to the U.S. DOT, more than 42,000 people are killed each year on the nation's highways. U.S. Fed. Highway Admin., *Public Roads* (May/June 2003), *available at* http://www.tfhrc.gov/pubrds/03may/02.htm.

CONCLUSION

The *Amici* ARTBA and NPPC respectfully request this Court to reverse the Ninth Circuit's ruling in *Defenders of Wildlife*.

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NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ARIZONA POWER AUTHORITY, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SAN DIEGO COUNTY WATER AUTHORITY, AND WESTERN URBAN WATER COALITION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*

Whether Section 7(a)(2) of the Endangered Species Act ("ESA" or "the Act") applies to federal agency action is of exceptional national importance and directly critical to agencies, such as *Amici*, who are responsible for delivering water and power to tens of millions of people, nationally significant agricultural and business interests, and States. All parties have consented to the filing of this Brief.[1]

Reading Section 7(a)(2) to apply to the nondiscretionary delegation of Clean Water Act ("CWA") permitting authority to the States and, by extension, to arguably trump the long-standing allocations of water governed by law, treaty, and various agreements would have devastating implications for future western water and power operations. *Amici* Arizona Power Authority, Central Arizona Water Conservation District, Imperial Irrigation District, the Metropolitan Water District of Southern California, and San Diego County Water Authority provide water and power to municipalities, public agencies, irrigation and power districts, and tribal entities. These agencies in turn provide water and power directly to homes, businesses, and other retail customers. *Amicus* Western Urban Water Coalition is an association of municipal water suppliers in six states serving the water and power needs of over 35 million people in the major metropolitan areas of the west.

Amici operate in States that hold delegated CWA permitting authority and are therefore concerned about the interplay between the CWA and the ESA. *Amici* are also concerned that the decision below could undermine *Amici's*

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[1] The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *Amici* state that their counsel authored this brief and *Amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *Amici* made a monetary contribution to its preparation.

water and power entitlements. If applied to *Amici's* entitlements, the decision could require the Bureau of Reclamation ("Reclamation") to ignore a Fish & Wildlife Service ("FWS") regulation, 50 C.F.R. § 402.03, which limits ESA consultation to discretionary agency actions, and could ultimately require the Secretary to divert water in contravention of *Amici's* contracts. Such an outcome would vitiate the security *Amici* have in the decrees, agreements, contracts, and permits that underlie their water and power entitlements. These interests are paramount to *Amici* and the millions of Americans in the west who rely on them for water and power services.

A. Arizona Power Authority

Arizona Power Authority ("APA") is a corporate and political body of the State of Arizona established by the legislature in 1944. ARIZ. REV. STAT. §§ 30-101 *et seq.*, §§ 45-1701 *et seq.* The APA is responsible for acquiring and marketing the State of Arizona's 377 megawatt share of power from Hoover Dam and then transmitting this power over the Parker-Davis and Pacific Intertie transmissions systems.

The APA serves 32 wholesale customers, including towns, irrigation, water and electrical districts throughout Arizona, with power—electrical energy generated from the flow of the Colorado River—from the Hoover Dam. Any interruption or diminution of the delivery of water downstream of Hoover Dam would significantly impact the APA's delivery of power to its customers because less water through the dam will result in less power output.

B. Central Arizona Water Conservation District

This Court's decree in *Arizona v. California* confirmed Arizona's right to consumptively use 2.8 million acre-feet

("maf")[2] of Colorado River water annually. *Arizona v. California*, 373 U.S. 546, 577 (1963) (opinion) and 126 S. Ct. 1543 (2006) (amended decree) (hereinafter "Decree"). Despite the Decree, however, Arizona could not fully use its Colorado River water because it lacked a water delivery system capable of transporting Colorado River water to the more populated regions of central and southern Arizona. Accordingly, in 1968, Congress enacted the Colorado River Basin Project Act, which authorized the Secretary of the Interior ("Secretary") to construct the water delivery system known as the Central Arizona Project ("CAP"). 43 U.S.C. §§ 1501, *et seq.* ("Basin Project Act").

In order to provide for CAP operation and repayment, the Basin Project Act also gave the Secretary the authority to enter into a master contract with an Arizona organization having the power to levy assessments against all taxable real property within its boundaries. 43 U.S.C. § 1524(b)(1). In response, the Central Arizona Water Conservation District ("CAWCD") was formed in 1971 as a political subdivision of the State of Arizona. ARIZ. REV. STAT. §§ 48-3701, *et seq.* CAWCD comprises Maricopa, Pinal and Pima counties and encompasses roughly 80 percent of Arizona's water users and taxpayers. In 1972, CAWCD entered into a master contract with the Secretary, providing for the repayment of reimbursable CAP construction costs and the delivery of the CAP water supply. CAWCD is responsible for operating and maintaining the CAP aqueduct system and repaying Arizona's share of CAP construction costs.

Pursuant to the Basin Project Act, its own Arizona enabling legislation, and the master contract, CAWCD has entered into

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[2] An acre-foot equals 325,851 gallons—the amount of water needed to cover one acre of land with water one foot deep. One acre-foot of water can supply the household needs of a four-person family for one year.

numerous subcontracts for delivery of CAP water supplies to agricultural irrigation districts and municipal and industrial entities in central and southern Arizona. CAWCD's subcontractors include the cities of Phoenix, Tucson, Scottsdale, Mesa, Peoria, Glendale, Tempe and Chandler, all of which depend upon the delivery of Colorado River water by means of the CAP. In 2004, CAWCD delivered over 1.5 maf of Colorado River water to agricultural, municipal, and tribal entities served by the CAP. Overall, Colorado River water delivered by the CAP makes up about one-third of Arizona's annual renewable water supplies.

C. Imperial Irrigation District

With more than 3,000 miles of canals and drains, the Imperial Irrigation District ("IID") is the largest irrigation district in the United States in terms of water usage. Situated along the southern California border with Mexico, growers within IID farm about one-half million acres with 3.1 maf of water per year. The economic value of the crops produced in the Imperial Valley routinely exceeds $1 billion annually. In the winter months, most of the winter vegetables consumed within the United States come from the Imperial Valley and the nearby Yuma Valley.

Of the water IID transports, approximately 97 percent is used for agricultural purposes, supporting Imperial County's ranking as one of the top ten agricultural regions nationwide. The remaining three percent of its water deliveries supply seven municipalities, one private water company and two community water systems, as well as a variety of industrial users and rural homes or businesses.

IID's electrical division, IID Energy, serves over 130,000 residential, commercial, and industrial customers in the Imperial and Coachella Valleys. Because IID's delivery system is based on gravity flow, IID generates a substantial amount of electrical energy with Colorado River water.

Combining hydroelectric power with other sources has made IID the fifth largest electrical utility in the State of California.

Settlement and development of the Imperial Valley began in the late 1800s and eventually involved an earthen water delivery canal from the area of Yuma, Arizona following the gravity path through northern Baja California, Mexico, and back up into the Imperial Valley. As a result of the large demand for irrigation water resulting from the year-round growing season, Congress enacted the Boulder Canyon Project Act of 1928 ("BCPA"), 43 U.S.C. §§ 617-617t, which provided for the construction of Hoover Dam and the All American Canal ("AAC"). The AAC is a very large water supply canal that runs from California's eastern border with Arizona for about 60 miles west into the Imperial Valley. Diversion into the AAC occurs at the Imperial Diversion Dam and desilting works, located on the Colorado River north of Yuma, Arizona. Water deliveries to IID through the AAC began in the early 1940s.

IID first established water rights in accordance with the water law of the State of California and now holds certificated rights to water from the Colorado River under state law. IID also has a water service contract with the Secretary for the delivery of Colorado River water pursuant to the authority granted to the Secretary in Section Five of the BCPA, 43 U.S.C. § 617d. Finally, IID holds a present perfected right in the amount of 2.6 maf as set forth in this Court's amended decree in *Arizona v. California*, issued on January 9, 1979. 439 U.S. 419 (1979); *see also* 126 S. Ct. 1543 (2006).

There is no useable groundwater in the IID water service area. The only source of water for growers within the IID service area, and the numerous small urban communities in the Imperial Valley, is surface water from the Colorado River. Any interruption or diminution in delivery of water from the Colorado River to the Imperial Valley farm

community would result in significant and dramatic economic impact, especially in the warm summer months. IID and the Imperial Valley community depend exclusively on the waters of the Colorado River under contracts with the Secretary.

D. The Metropolitan Water District of Southern California

The Metropolitan Water District of Southern California ("Metropolitan") is a consortium of 26 cities and water districts providing drinking water to 18 million people in parts of Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura Counties. It is a public agency established by the California legislature in 1928. CAL. WATER CODE App. §§ 109-1, *et seq*. Metropolitan's members, in turn, provide water directly to homes, businesses, and other retail customers or to water purveyors who do so. Metropolitan currently delivers an average of 1.9 maf of water per year to a 5,200 square mile service area. The service area stretches some 200 miles along the coastal plain of Southern California and encompasses parts of six Southern California counties. Metropolitan acts essentially as a "wholesaler" of water to its Southern California water agency members, many of which distribute water to end-users from local sources as well as from Metropolitan. Metropolitan's water supply is a vital part of the infrastructure supporting a $700 billion regional economy in Southern California.

Metropolitan receives imported water from two principal sources: the Colorado River via the Colorado River Aqueduct, and the rivers draining to the San Francisco Bay-Sacramento and San Joaquin River Delta via the California Aqueduct of the California Department of Water Resources' State Water Project. Under contracts with the Secretary, Metropolitan has contractual rights to consumptive use of 1.212 maf of Colorado River water stored in Lake Mead. In addition to those contracts, Metropolitan also has a contract with the Secretary for the delivery of surplus flows from the

Colorado River. Metropolitan and other southern California purchasers also hold power contracts with the United States to purchase power from Hoover Dam.

E. San Diego County Water Authority

The San Diego County Water Authority ("SDCWA") is a public agency serving the San Diego region of Southern California as a wholesale supplier of water. CAL. WAT. CODE App., Chapter 45. SDCWA supplies water to approximately three million people—over 90 percent of the population of San Diego County—to support the region's $142 billion economy.

SDCWA is a member agency of Metropolitan and the largest consumer of Metropolitan-supplied water. Metropolitan provides between 75 and 90 percent of the water consumed annually within the SDCWA service territory: approximately 600,000 to 700,000 acre-feet of water per year. SDCWA has contracted to receive up to 277,700 acre-feet per year of conserved Colorado River water: 200,000 acre-feet per year of water conserved initially by land fallowing and then by efficiency improvements to delivery and farming operations within the Imperial Valley through a transfer agreement with IID; and 77,700 acre-feet per year through agreements with the United States, IID, Coachella Valley Water District, and Metropolitan.

F. Western Urban Water Coalition

The Western Urban Water Coalition ("WUWC") is a national association of municipal water utilities, currently serving over 35 million urban water consumers in the west's largest metropolitan areas in Arizona, California, Colorado, Nevada, Utah and Washington. WUWC's water supplier members include the following urban water utilities that have an interest in the issues in the case at bar: Arizona—Central Arizona Project, City of Phoenix, City of Tucson;

California—East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utility Commission, Santa Clara Valley Water District; Colorado-Denver Water Department, City of Aurora; and Nevada—Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority.

The organization is an unincorporated association established in 1992 to promote an understanding of the water needs of western cities. WUWC's charter is to provide a reliable, high-quality urban water supply for present and future water users. The WUWC is organized to help achieve that goal through water policies, programs and regulations.

Members of the WUWC own and operate water supply projects and, in many instances, wastewater treatment facilities. These projects consist of water conduits, reservoirs, hydroelectric facilities, power houses, transmission lines, and other facilities involved in water supply. These facilities are essential to the ability of WUWC members to fulfill their mission of serving the water resource-related needs of the majority of the populations of the western states. All WUWC members operate in states that have delegated NPDES authority under the Clean Water Act (including Arizona, at issue here), and all WUWC members either currently hold, or are applying for, such permits, which are integral to the operation of their utility systems.

STATEMENT OF THE CASE

Amici file this brief in support of the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005), *petitions for cert. filed*, 75 U.S.L.W. 3106 (U.S. Sept. 6, 2006) (No. 06-340), 75 U.S.L.W. 3235 (U.S. Oct. 23, 2006) (No. 06-549), filed by the United States Environmental

Protection Agency ("EPA") and by the National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce and American Forest & Paper Association.

The panel invalidated EPA's transfer of the CWA National Pollutant Discharge Elimination System ("NPDES") permit program to Arizona, erroneously interpreting the ESA as expanding the obligation of EPA to act without regard to the statutory mandates or constraints placed on EPA by other Acts of Congress (here, the CWA). Under the CWA, the NPDES program is administered by EPA unless the program is transferred to the State. If the State meets nine criteria specified in CWA Section 402(b), the CWA provides that EPA "shall approve each such submitted program unless [it] determines that adequate authority does not exist" to ensure that the nine specified criteria are satisfied. 33 U.S.C. 1342(b). When EPA administers the NPDES program, EPA will consult with the FWS whenever an action taken under the program "may affect" listed species. Once the program is transferred, however, the State, not being a federal agency, will not be obligated to enter into consultation with the FWS under the federal ESA.

EPA found that Arizona had met all the requirements of Section 402(b) and approved the State of Arizona's application to administer the NPDES program. That finding is not disputed by any party. Instead, Defenders of Wildlife and other environmental groups contended that EPA violated Section 7(a)(2) because EPA did not sufficiently analyze the effects of the loss of Section 7 consultation when EPA transferred the permit program to Arizona. The court of appeals agreed and invalidated EPA's approval of transfer on the grounds that ESA Section 7(a)(2) creates independent

authority beyond the EPA's statutory authority and that authority overrides any constraints imposed by Congress under the CWA.

The decision creates uncertainty about the scope of a federal agency's obligation to act within its organic authority despite Section 7(a)(2) of the ESA. The decision, therefore, threatens Reclamation projects throughout the west, including its Colorado River water and power facilities, creating uncertainty over Reclamation's obligation to act in accord with the Law of the River[3] in implementing its contracts with *Amici*.

ESA Section 7(a)(2) consultation is explicitly limited to actions "in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added); *see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996). The court of appeals wrongly held that Section 7(a)(2) applies even if a federal agency has no discretion under the law governing the conduct of the agency to act. The proper limits of ESA consultation are of exceptional importance to *Amici* in the context of the scope of the Secretary's discretion in carrying out duties involving western water and power contracts. If a court finds that the Secretary must modify the rights and duties under an existing contract to other uses claimed to be beneficial, notwithstanding statutory or contractual limitations, *Amici's* contracts are at risk.

Amici's concern, therefore, is not only the implications of the panel's decision on the NPDES program nationwide, but also the potential impact the decision will have on future water and power operations and rights to water and power

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[3] The Law of the River collectively refers to the 1944 bilateral treaty between the United States and Mexico, the Treaty for the Utilization of Waters of Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, 3 U.N.T.S. 313, the compacts, laws, and cases that govern the allocation of Colorado River water.

under contracts with Reclamation or other federal entities. This Court should grant the petitions for writ of certiorari to hear arguments why Section 7(a)(2) of the ESA does not apply to the nondiscretionary act of CWA permitting authority delegation to the States. Accepting review will also allow the Court to confirm that Section 7(a)(2) does not apply to other statutory mandates or constraints. *Amici* rely on the property rights they have been granted to provide water and power to millions of people. Whether Section 7(a)(2) overrides statutory mandates or constraints placed on an agency by other Acts of Congress or other binding legal obligations is critical to the security of *Amici's* rights and the well-being of the communities served by their projects.

The court of appeals' decision impermissibly expands the Section 7(a)(2) consultation requirement under the ESA, contrary to applicable regulations and in direct conflict with the decisions of the Courts of Appeals for the Fifth and D.C. Circuits. This Court should grant the petition for writ of certiorari to make clear that ESA Section 7(a)(2) does not override other statutory mandates or constraints placed on an agency's discretion by other Acts of Congress, contracts, treaties, or other binding legal obligations.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE OF WHEN ESA CONSULTATION IS REQUIRED IS OF EXCEPTIONAL IMPORTANCE.

Amici have devoted considerable resources monitoring and participating in cases across the country where plaintiffs sought to require agencies to disregard binding water and power obligations and to force deference to ESA Section 7(a)(2) for the benefit of listed species where such deference is not required under the law. In these challenges, there is a common legal thread—whether the ESA abrogates the pre-existing specific obligations of federal agencies under their

governing statutes and contracts. *Amici* have consistently argued that where federal agencies have no discretion to undertake actions under federal law, or under contracts entered into under those federal laws, the federal agencies have no duty to consult under Section 7(a)(2) of the ESA. Any overly broad construction of the Section 7(a)(2) consultation authority that would allow Reclamation unilaterally to reduce water deliveries and divert water to other uses would impermissibly expand Reclamation's existing authority under its organic statutes.

The ESA directs the action agency to use its existing authorities to carry out the ESA's objectives, including the avoidance of jeopardy. The ESA does not expand the authority of the acting agency. The question under the ESA is whether the agency is taking discretionary action pursuant to its authorities. EPA does not have such discretion under the CWA to delegate NPDES permitting authority to the States, nor does Reclamation have discretion under the contracts to unilaterally redirect water or power for any purpose.

In *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003) ("*Defenders*"),[4] the D.C. District Court held that Reclamation's duty to consult with other agencies under the ESA does not extend to operations affecting species downstream from river flows over which Reclamation had no discretionary control. In *Defenders*, the Plaintiffs challenged Reclamation's management of the lower Colorado River, arguing that Reclamation should send more water to Mexico for the benefit of listed species found there. Reclamation had consulted under ESA Section 7(a)(2) regarding certain operations, but concluded that no formal consultation was required regarding the Totoaba Bass, classified as endemic to

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[4] *Amici* APA, CAWCD, IID, Metropolitan, and SDCWA filed an amicus brief in *Defenders of Wildlife v. Norton* on the proper scope of Reclamation's discretion and how it should be viewed in light of the ESA.

Mexico, because Reclamation lacked any discretion over water deliveries to or within Mexico under treaties and this Court's decision in *Arizona v. California*, and therefore had no ability to reverse conditions in the Colorado River delta in Mexico. *Id.* at 66. FWS and the National Marine Fisheries Service ("NMFS") agreed. *Id.* at 67.

The court's decision that ESA consultation was not required turned on a finding that Reclamation had no authority to divert water for the benefit of species in Mexico:

> The record contains no suggestion of a way, with or without consultation [under Section 7(a)(2) of the ESA], for Reclamation to ensure that more water reaches the listed species in the delta. The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation's authority.

Id. at 67-68 (citing *Arizona v. California*, 376 U.S. 340 (1964)).

The court emphasized the limited scope of the Secretary's discretion under the Law of the River in determining that consultation under ESA Section 7(a)(2) was not required because no diversion of water to benefit species was allowed: "[I]t seems unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statues, and contracts between the government and water users that account for every acre foot of lower Colorado River water." *Id.* at 69.

In *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, Case Nos. 05-2399, 06-2020, 06-2021 (consolidated) (10th Cir. filed Dec. 29, 2005) ("*Silvery Minnow*"), the U.S. Court of Appeals for the Tenth Circuit is faced with a similar issue arising from a district court decision misconstruing the

ESA to impose new obligations on Reclamation. In *Silvery Minnow*, Plaintiffs sought to require Reclamation to release water or to restrict the Middle Rio Grande Conservancy District's ("MRGCD") diversions of water for the benefit of the silvery minnow. FWS issued a Biological Opinion ("BiOp") concluding it was not feasible for Reclamation to release water for the silvery minnow. The district court rejected the BiOp and ordered Reclamation to make releases or restrict MRGCD's diversions. *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222 (D.N.M. 2002).[5] The district court erroneously transmuted the ESA's requirement that Reclamation consult on its discretionary actions into a substantive command that Reclamation unilaterally divert contractually-allocated water from long-standing Reclamation

[5] On appeal from the district court's opinion, the Court of Appeals for the Tenth Circuit affirmed, 333 F.3d 1109 (10th Cir. 2003), but subsequently vacated its affirmation when the issue on appeal became moot during the pendency of petitions for rehearing en banc. 355 F.3d 1215 (10th Cir. 2004). On remand, Defendants argued that Plaintiffs' claims were moot due to intervening events, including the issuance of a new BiOp and Congressional legislation regarding the projects at issue in the litigation. Defendants moved to vacate the district court's earlier memorandum opinions (which misconstrued the ESA's requirement that Reclamation consult on its discretionary actions) because those opinions were not subject to full and final appeals. In its November 22, 2005 opinion, the district court, among other things, declined to vacate its earlier opinion. *Rio Grande Silvery Minnow v. Keys*, No. 99-1320 (D.N.M. Nov. 22, 2005) (order and final judgment). The district court also entered a permanent injunction requiring the Federal Defendants to apply the conclusions in its April 19, 2002 and September 23, 2002 Memorandum Opinions as to the scope of Reclamation's discretion over the Middle Rio Grande Project in all future ESA consultations on project operations. The district court's November 22, 2005 decision is the subject of the appeal now pending before the Court of Appeals for the Tenth Circuit.

contractors for the benefit of the silvery minnow.[6] The 10th Circuit must now determine what federal actions are properly subject to Section 7(a)(2) consultation.[7]

The ESA does not give an agency new authority above and beyond its underlying organic authority. But the court of appeals' decision here does just that: "[D]espite FWS's regulation, the majority finds that the ESA applies to anything 'authorized, funded, or carried out' by a federal agency, ... whether discretionary or not." *Defenders of Wildlife v. U.S. EPA*, 450 F.3d 394, 398 (9th Cir. 2006) (Kozinski, J. *dissenting from en banc reh'g denied*). The decision thus eliminates discretion as a prerequisite to the obligation to consult and renders 50 C.F.R. § 402.03 meaningless.

If the panel's decision stands, arguably all federal agencies would have an independent, affirmative obligation above and beyond their underlying authorities to act under ESA Section 7(a)(2):

> We hold that approving Arizona's pollution permitting transfer application was an agency action "authorized" by the EPA, thus triggering both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. The EPA may have complied with its obligations under the Clean Water Act, but compliance with a "complementary" statute cannot relieve the EPA of its *independent obligations* under section 7(a)(2).

Defenders of Wildlife, 420 F.3d at 971 (emphasis added). Under the majority's decision, regardless whether the agency

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[6] Of course, there is always room for Reclamation or local authorities to take voluntary action to acquire water supplies or resources from willing sellers to benefit protected species.

[7] *Amici* APA, CAWCD, IID, and Metropolitan filed an amicus brief in support of the United States in *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, No. 05-2399 (10th Cir. filed June 26, 2006).

has any discretion to take action to benefit listed species, the agency would be obliged to act. This would enlarge the scope of the ESA Section 7(a)(2) consultation requirement so as to trump all other statutes.[8]

II. THE NINTH CIRCUIT OPINION CREATES A DIRECT CONFLICT WITH OTHER FEDERAL CIRCUITS REGARDING THE APPLICABILITY OF ESA SECTION 7(A)(2) TO NON-DISCRETIONARY FEDERAL ACTIONS.

The court of appeals' decision directly conflicts with the Fifth Circuit's decision in *American Forest and Paper Ass'n v. U.S. EPA*, 137 F.3d 291 (5th Cir. 1998) ("*AFPA*") and the D.C. Circuit's decision in *Platte River Whooping Crane Critical Habitat Maint. Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992) ("*Platte River*").

AFPA involved EPA's approval of Louisiana's NPDES permitting program under CWA § 402(b), the precise agency

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[8] While *Amici* focus here on the impact of the court of appeals' decision on water contracts with the Secretary of the Interior, there are a host of other contexts potentially affected by the panel's decision. *See, e.g., Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1091-92 (9th Cir. 2004) (holding that the ESA did not require the Navy to consult with NMFS about whether an accident would jeopardize the continued existence, or adversely affect the nearby critical habitat, of threatened salmon species because the Navy had limited discretion in implementing the project at issue); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975-76 (9th Cir. 2003) (finding that because the plain language of the High Seas Fishing Compliance Act entrusted the NMFS with substantial discretion to condition permits to inure to the benefit of listed species, the ESA required that the NMFS conduct consultation to assess the potential impact to protected species); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1081 (9th Cir. 2001) (holding that while the FWS retained certain discretion over Simpson Timber's activities, they did not "retain discretionary control to make new requirements to protect species that subsequently might be listed as endangered or threatened").

action at issue in the case at bar. As a condition of its approval of the Louisiana program, EPA required Louisiana to consult with FWS and NMFS before issuing permits. The Fifth Circuit found that the CWA did not authorize EPA to impose the consultation condition and that, under the CWA, EPA lacked authority to impose conditions to benefit listed species. *Id.* at 298.

In *AFPA*, EPA argued that its decision to consider endangered species "is not only authorized but compelled by ESA § 7(a)(2)." *Id.* at 297. The court rejected this interpretation of the ESA:

> The flaw in this argument is that if EPA lacks the power to add additional criteria [under the CWA], nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.

Id. at 298. The Fifth Circuit concluded that EPA could not invoke the ESA "as a means of creating and imposing requirements" not authorized by the CWA. *Id.* at 299.

The D.C. Circuit has also rejected a challenge seeking to expand agency authority under the ESA. In *Platte River*, environmental groups brought a challenge to annual licenses issued to two hydroelectric projects on the Platte River by the Federal Energy Regulatory Commission ("FERC"). Under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, FERC was precluded from amending the annual licenses given to a hydroelectric plant. For that reason, FERC could not insert wildlife protective conditions into the licenses when they were renewed. *Platte River*, 962 F.2d at 32.

The groups argued that, notwithstanding the statutory limits of the Federal Power Act, FERC had an affirmative obligation to impose conditions to protect listed species under ESA Section 7(a)(2). *Id.* at 33. The D.C. Circuit rejected that

argument: "[T]he statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Id.* at 34 (emphasis in original).

The panel below acknowledged that there was "an existing intercircuit conflict on the question before us," comparing *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989) and *Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir. 1979) with *AFPA* and *Platte River*. The court of appeals did not find the D.C. Circuit and Fifth Circuit decisions persuasive, but instead said it was relying on decisions from the First and Eighth Circuits. *Defenders of Wildlife*, 420 F.3d at 970. As Judge Kozinski explained in his dissent from the court of appeals' denial of en banc review, those cases are inapposite:

> The First and Eighth Circuit cases, however, do not support the majority's position. Both cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does.

Defenders of Wildlife, 450 F.3d at 401 n.5 (emphasis in original). *Conservation Law Foundation* involved the sale of offshore leases for oil and gas exploration under the Outer Continental Shelf Lands Act. The First Circuit held that the ESA would continue to apply to future discretionary actions taken after the lease sale was held. 623 F.2d at 715.

In *Defenders of Wildlife v. Administrator, EPA*, the issue was whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, exempted EPA from complying with ESA requirements when registering pesticides. 882 F.2d 1294. The Eighth Circuit found FIFRA's provision that a pesticide may be registered only if it does not cause "unreasonable adverse effects" to be consistent with ESA requirements. Thus, the Eighth Circuit

held that EPA was not exempt from complying with the ESA under FIFRA and concluded that three EPA registrations of strychnine constituted a "taking" under Section 9 of the ESA. But the court did not find a violation of Section 7(a)(2).

The Ninth Circuit's decision reads the ESA to provide sweeping independent authority, and indeed an affirmative duty beyond an agency's statutory authority, to protect endangered species regardless of the statutory limitations imposed on that agency. Even if the court of appeals' reading of *Conservation Law Foundation* and *Defenders of Wildlife* were correct, the Ninth Circuit's decision squarely conflicts with the Fifth and D.C. Circuits and has potentially far-reaching effects on water and power deliveries to millions of citizens throughout the west.

CONCLUSION

For all of the foregoing reasons, the petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* CROPLIFE AMERICA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether the court of appeals correctly held that the decision of the Environmental Protection Agency ("EPA") to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1536(a)(2); and, if so, whether the court of appeals should have remanded to the EPA for further proceedings without ruling on the interpretation of ESA § 7(a)(2)?

2. If the court below should have remanded to obtain the agencies' construction of ESA § 7(a)(2) without imposing the panel's preferred construction, now that the agencies' construction has been obtained, should this Court reach the merits of the ESA § 7(a)(2) interpretive issue decided by the court below?

3. Whether procedural "consultation" under ESA § 7(a)(2) necessarily applies to precisely the same set of "action[s] authorized, funded, or carried out by such [federal] agency" as does § 7(a)(2)'s substantive constraints that such actions be "not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of" designated critical habitat?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae CropLife America[1] supports reversal of the divided Ninth Circuit panel opinion below, which found that § 7(a)(2) of the Endangered Species Act ("ESA")[2] overrides the Clean Water Act ("CWA") § 402(b), 33 U.S.C. § 1342(b), standards for approving a State program to issue National Pollutant Discharge Elimination System ("NPDES") permits (sometimes called a "transfer" of jurisdiction). *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005) (Fed. Pet. App. 1a-67a), *reh'g denied*, 450 F.3d 394 (9th Cir. 2006) (Fed. App. 68a-92a) ("*Defenders*"). The court below declined to remand to obtain the interpretation by the agencies charged with implementing ESA § 7(a)(2),[3] and imposed its own misguided interpretation. The agencies have now clearly stated their construction that, due to EPA's lack of discretion

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than CropLife, its members, and its counsel made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All parties other than the United States submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The Federal Petitioner's written consent to the filing of this brief has been filed with the clerk.

[2] "Each Federal agency shall, in consultation with and with the assistance of the Secretary [who acts through the U.S. Fish and Wildlife Service ('FWS') or National Marine Fisheries Service ('NMFS') (collectively, the 'Services')], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species ['listed species'] or result in the destruction or adverse modification of" designated critical habitat. 16 U.S.C. § 1536(a)(2).

[3] Those agencies are: (1) the agency proposing the action ("action agency"), in this instance the Environmental Protection Agency ("EPA"); and (2) the Services, who have a "consultation" role under ESA § 7(a)(2).

under CWA § 402(b), ESA § 7(a)(2) does not apply to the transfer. Fed. App. 93a-116a.

CropLife America is the nationwide not-for-profit trade organization representing the major manufacturers, formulators, and distributors of crop protection and pest control products. CropLife is headquartered in Washington, D.C. Its member companies produce, sell, and distribute virtually all the crop protection, specialty, and biotechnology products used by American farmers, professional users, and consumers, including the vast majority of pesticides registered by EPA under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").

CropLife and its members seek to establish an efficient and effective procedure by which EPA can comply with ESA § 7 in conjunction with registering pesticides under FIFRA. Thus, CropLife has an interest in securing judicial interpretations of ESA § 7 that will achieve the purposes of the ESA without imposing additional barriers to activities of the regulated community under organic statutes such as FIFRA or, as in this case, the CWA. The Ninth Circuit's reasoning below threatens to "modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* agency." *Defenders*, 450 F.3d at 398-99 and n.4, 401 (Kozinski, J., dissenting) (Fed. App. 69a, 74a-79a, 82a). Indeed, CropLife is party to pending litigation under the ESA and FIFRA in which the district court issued an unfavorable ruling based in part on the Ninth Circuit's reasoning in the instant case. *See Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1177-78 (W.D. Wash. 2006) (quoting *Defenders*, 420 F.3d at 961), *appeals pending*, Nos. 06-35873, 06-35891, 06-35899 (9th Cir.).

SUMMARY OF ARGUMENT

Amicus would answer the question(s) posed by this Court as follows. First, once the Ninth Circuit found an inconsistency in EPA's position, it erred in not remanding to obtain the EPA's and FWS's construction of a statute they administer. The panel should not have imposed its preferred construction of ESA § 7(a)(2) on them. *Gonzales v. Thomas*, 126 S. Ct. 1613, 1614-15 (2006); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Second, the purpose of a remand – obtaining the expert agencies' views – has now been achieved by the agencies' uniform interpretation that ESA § 7(a)(2) does not apply to or constrain a transfer of jurisdiction under the exclusive standards in CWA § 402(b). *See* Fed. App. 93a-116a. As a result, this case is well-positioned for this Court to provide much-needed guidance on the issue that the court below decided and that has divided the lower courts. That recurring and important issue is: Does ESA § 7(a)(2) override the directives of other statutes, or does § 7(a)(2) operate only where another statute confers authority on the action agency to act based on wildlife considerations?

Third, EPA was not arbitrarily inconsistent. EPA, by initiating consultation and receiving ESA § 7(a)(2) clearance from FWS, rationally avoided a litigation issue on whether "consultation" was required. Because the leading opinion of the era stated the ESA "requires EPA to consult" before undertaking agency action, EPA did not act arbitrarily in initially following that guidance. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298-99 (5th Cir. 1998).

Section I of this brief develops those themes. Section II alerts the Court to the Ninth Circuit's mistaken assumption that the procedural "consultation" and the substantive aspects

of ESA § 7(a)(2) must apply to the precisely same class of "agency actions." The current ESA § 7 rules in 50 C.F.R. Part 402, and the timely provision of federal permits and services, depend on a different view. Under that view (ratified by Congress), "consultation" with the Services is not universally required before any of the thousands of actions federal agencies take each day can be implemented.

ARGUMENT

I. While The Court Below Erred In Not Stopping And Remanding Once It Found EPA's Actions To Be Arbitrarily Inconsistent, The Agencies' Final Interpretation Of ESA § 7(a)(2) Is Before This Court. This Court Should Provide Much-Needed Guidance On The Scope Of ESA § 7(a)(2).

In granting review on January 5, this Court added the first Question Presented at page i. CropLife's second Question Presented is the logical follow-up. The Court posed its question in light of the following fact pattern.

In the Ninth Circuit, the panel majority (Judges Berzon and Reinhardt) reasoned an agency's action must be reviewed on the "grounds . . . upon which the record discloses that its action was based" (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). *Defenders*, 420 F.3d at 960 (Fed. App. 25a). EPA allegedly had stated that ESA "section 7 requires consultation regarding the effect of a permitting transfer on listed species" because its action "'may affect'" listed species." *Id.* at 959-60 (Fed. App. 23a, 25a). But, FWS "reasoned that there could be no such effect" caused by any discretionary EPA action, due to the mandatory nature of a transfer if the CWA § 402(b) standards are met. EPA then transferred authority based on that biological opinion. *Id.* at 961 (Fed. App. 26a-27a). The panel felt that "EPA decided

that it had to consult but had no authority to do anything concerning the matter about which it had to consult" and that this was arbitrarily inconsistent because "[*b*]*oth* the consultation obligation and the obligation to 'insure' against jeopardizing listed species are triggered" by the same set of agency actions. *Id.* "Because EPA's "decisionmaking was based on contradictory views of the same words in the same statutory provision," EPA acted arbitrarily and the "transfer decision cannot stand." *Id.* at 961-62 (Fed. App. 27a-28a). Though the panel concluded "we must remand to the agency for a plausible explanation . . . based on a single, coherent interpretation of the statute" (*id.* at 962 (Fed. App. 28a)), the panel then went on to explain and impose its own views on how ESA § 7(a)(2) should operate. *Id.* at 962-71 (Fed. App. 28a-48a).

The distinct portions of the Court's question, and the logical follow-up, are answered in the subsections below.

A. The Court Below Erred In Imposing Its View On The Scope Of ESA § 7(a)(2) Without First Remanding To Obtain The Agencies' Construction Of A Statute They Administer

1. Before the Ninth Circuit panel, Defenders of Wildlife did *not* urge the transfer be set aside on the ground that federal agencies were interpreting ESA § 7(a)(2) inconsistently as to procedural consultation and substantive constraints.[4] Nor did Defenders cite *SEC v. Chenery Corp.*,

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[4] As illustrated by the "Issue Presented for Review" in its opening brief, Defenders of Wildlife pursued different ESA § 7 compliance issues: "Whether EPA violated the [ESA] . . . by relying on FWS's BO [biological opinion] in determining that its transfer action is not likely to jeopardize the continued existence of listed species . . . where the BO is not based on the best scientific data available, fails to adequately analyze all of the effects on listed

(continued....)

on which the panel relied. Contrary to the case law under Federal Rule of Appellate Procedure 28(a), the court below reached out to find that EPA acted arbitrarily on a ground not asserted in Defenders' opening appellate brief. Thus, the Ninth Circuit panel erred by deciding an "inconsistency" issue the parties had not briefed.

2. As will be shown in Section I.C, below, the reviewable final actions by EPA and FWS were not arbitrarily inconsistent as to ESA § 7(a)(2)'s scope regarding procedures (consultation) and substance (avoiding discretionary federal actions likely to jeopardize a listed species' existence). But, the panel found EPA had been "contradictory."

This Court has asked whether, once the court of appeals found EPA's current position to be arbitrary, the panel should have remanded to EPA for a coherent legal interpretation without a panel ruling on the meaning of ESA § 7(a)(2). Our answer is "yes." The panel should have remanded and stopped there.

The panel understood that it had a duty to remand. "We must remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." *Defenders*, 420 F.3d at 962 (Fed. App. 28a). Inconsistent with a remand to the agency and its embedded

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species . . ., fails to meaningfully consider the status and environmental baselines of each affected species and critical habitat, and ignores cumulative effects." Petitioners' [Defenders'] Opening Br. at 2 (9th Cir. Sept. 18, 2003). The panel addressed the issues presented by Defenders of Wildlife only near the tail end of its opinion. *See Defenders*, 420 F.3d at 972-77 (Fed. App. 48a-52a).

concept of primary agency jurisdiction,[5] the panel then inexplicably went on, at considerable length, to state as binding precedent its views on how ESA § 7(a)(2) should operate. *Id.* at 962-71 (Fed. App. 28a-48a). Judge Kozinski correctly chastises the panel for concluding an issue should be "remanded to EPA for further clarification," but then "embark[ing] on a 17-page boondoggle, conducting the very analysis that EPA should have had an opportunity to conduct for itself." *Defenders*, 450 F.3d at 397 (Fed. App. 72a).

Here again, the "Ninth Circuit's failure to remand is legally erroneous" – the panel erred in determining a matter "in the first instance" without obtaining EPA's and FWS's views of statutes they administer. *Gonzales v. Thomas*, 126 S. Ct. at 1614-15. "[T]the proper course, except in rare circumstances, is to remand to the agency for additional" explanation. "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions." *Florida Power & Light*, 470 U.S. at 744.

Absent "special circumstances," the "ordinary" remedy is "vacat[ing] the judgment of the Court of Appeals" and remanding so the agency can "decid[e] whether the facts as found fall within a statutory term." *Gonzales*, 126 S. Ct. at 1615. Thus, the court below committed reversible error in opining on how ESA § 7(a)(2) should operate.

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[5] *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65-67 (2004) ("protect agencies from undue judicial interference with their lawful discretion"); *Florida Power & Light*, 470 U.S. at 744; *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-65 (1956).

B. The Agencies' Interpretation Of ESA § 7(a)(2) Provides The Information That Would Have Been Obtained By A Remand. This Court Should Provide Guidance On The ESA § 7(a)(2) Issue Decided Below.

1. This Court should *not* simply vacate most of the opinion below and remand to either the agency or the Ninth Circuit. Unlike in *Gonzales v. Thomas*, "special circumstances" exist here.

The purpose of the remand the Ninth Circuit should have ordered is, of course, to obtain the agencies' construction of statutes and rules they administer. Federal Petitioner has provided the information that would have been provided after a remand. At Fed. App. 96a-102a, 106a-10a, EPA and FWS provide their considered opinion that no part of ESA § 7(a)(2) (neither procedural "consultation" nor substantive avoidance of jeopardy) applies to CWA § 402(b) transfers. That supplies the "single, coherent interpretation of the statute" demanded by the court below. *Defenders*, 420 F.3d at 962 (Fed. App. 28a). Accordingly, the option of remanding to the agencies now is moot as a practical matter.

Nor would it be appropriate to vacate and remand to the Ninth Circuit. The opinion below and the denial of rehearing below make clear that the Ninth Circuit would reject, and has rejected, the agencies' current construction that ESA § 7(a)(2) does not apply to a CWA § 402(b) transfer.[6]

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[6] *See Defenders*, 420 F.3d at 962-71 (Fed. App. 31a-47a); *Defenders*, 450 F.3d 394 (Fed. App. 68a). Significantly, in explaining why the majority opinion should not be reheard on the remand-to-the-agencies basis asserted by Judge Kozinski, Judge Berzon states: "EPA did decide that a transfer was appropriate and that it did not have the authority to consider the impact on endangered and threatened species of the transfer decision. We disagree with (continued....)

Accordingly, vacating and remanding to the court below also would serve no purpose.

2. For many reasons, this Court should decide the recurring question regarding the scope of ESA § 7(a)(2). There is an active controversy on that question *vis a vis* CWA § 402(b) as applied to Arizona and to Alaska. Moreover, the precedent created below places at risk numerous other federalism-related transfers of jurisdiction to States, as well as federal licensing, registration, and permitting programs, under sundry environmental laws.

More generally, "[q]uestions as to the proper meaning and interpretation of [50 C.F.R.] § 402.03 [and ESA § 7(a)(2)] arise regularly in the courts." Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 STAN. ENVTL. L.J. 125, 179 (2006). Over 20 lower court opinions have addressed that question in varying ways, leading to "discordant case law." *Id.* at 151-94. The Court's exercise of its supervisory authority would provide much-needed guidance to the lower courts and to regulated parties.

There is no bar to the Court's resolution of whether ESA § 7(a)(2) serves as a font of new, overriding authority. The court below clearly decided that question. This Court can review a question decided by the court below, even if it had not been raised by the parties in their briefs. *E.g.*, *Verizon Communications v. FCC*, 535 U.S. 467, 530 (2002); *United States v. Williams*, 504 U.S. 36, 41-45 (1992). Moreover, as the key arguments on Petitioners' side of that question were

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both conclusions" and the agency should not have additional "chances to consider a factual or legal question before appellate review." *Defenders*, 450 F.3d at 403 n.1 (Fed. App. 85a).

preserved in the Petitions for certiorari (and earlier),[7] Rule 14 prerequisites to reaching an issue have been satisfied.

Further, an alleged "inconsistency" in a party's prior position is "just one of several considerations" bearing on "whether to decide a question on which [the Court] granted certiorari." *United States v. Wells*, 519 U.S. 482, 487-89 (1997). Just as the Court concluded in *Wells* "it seems sensible to reach the question presented" (*id.*), it is sensible for the Court to decide the central ESA § 7(a)(2) interpretive issue on which certiorari was granted.

3. The Court should reject any argument that the agencies' interpretation of ESA § 7(a)(2) in Fed. App. 93a-116a can be ignored because it is *post hoc* and not allowed by *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The necessary consequence of any remand for an agency's additional explanation is the production of material that is "*post hoc*" in some sense. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). This is permissible, as the agency's explanation on a matter over which the Executive Branch agency has primary authority remains crucial for judicial review. *See id.* at 419-21; *Florida Power & Light*, 470 U.S. at 744. Hence, the supplemental information obtained by a remand to an agency, an agency declaration, or (here) formal agency letters trump the "basis" concerns in *SEC v. Chenery*.

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[7] The Petitioners' briefs to the panel below did not address whether ESA § 7(a)(2) consultation was required, as that was not an issue raised in Defenders of Wildlife's opening brief. *See* note 4, above. But, once the split panel opinion forced that issue front and center, EPA and FWS did provide their interpretation that ESA § 7(a)(2) did not apply – in a rehearing petition (at 6 n.1), the Federal Petition here, and the material in Fed. App. 93a-116a.

Further, while *Chenery* is sometimes perceived as limiting an agency to its contemporaneously-stated basis, the opinion does not prohibit later agency clarifications. For part of SEC's order (approving a reorganization plan for a public utility), SEC said it was applying the "broad equitable principles" in certain case law. This Court reviewed only the grounds "upon which the record discloses that its action was based." 318 U.S. at 87. But the Court also recognized it should not remand where an agency reached the right result but "upon a wrong ground or gave a wrong reason." *Id.* at 88. The Court found that principle inapplicable there because *Chenery* involved a "determination of policy and judgment which the agency alone is authorized to make and which it had not made." *Id.*

In contrast, the instant case stands in this Court with the agencies' "determination" – their legal interpretation that ESA § 7(a)(2) does not apply to CWA § 402(b) transfers.[8] The principle against considering a *post hoc* rationalization by counsel applies only "where the agency itself has articulated no position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Here, the Court has the duly-considered interpretation by the agencies implementing ESA § 7(a)(2) and CWA § 402(b) that deserves deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001).

In comparable circumstances, this Court has given credit to such arguably "*post hoc*" legal interpretations. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United

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[8] This Court also mentioned *Chenery* in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). The Court found the agency's explanation was arbitrarily inadequate. While there was no subsequent agency explanation in *State Farm* and *Chenery*, there is one here.

States' legal interpretation on another ESA § 7 issue – whether the Services' rules in 50 C.F.R. Part 402 are binding on other agencies – was not settled until briefing before this Court. The four Justices reaching the issue credited and addressed the Solicitor General's interpretation that those rules do not bind other agencies. 504 U.S. at 568-71. In another decision, though an agency's final legal interpretation came before the Court "in the form of a legal brief," the Court considered that interpretation and rejected complaints it was a "*post hoc* rationalization." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

It is also relevant that *Chenery* was decided before adoption of the Administrative Procedure Act ("APA"). The APA now governs judicial review of ESA claims against federal agencies.[9] The APA, by providing that "due account shall be taken of the rule of prejudicial error," also reflects the concept of harmless error. 5 U.S.C. § 706. An alleged error is harmless if it did not prejudice the outcome or if the matter is clarified by the time it reaches the court. *E.g., Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 120-21 (9th Cir. 2004).

Here, the alleged error is the agencies' failure to state, at the time of transfer of NPDES authority to Arizona, that since ESA § 7(a)(2) does not bar the transfer, § 7(a)(2) consultation also does not apply. But that omission is not error – no ESA or APA principle required a statement regarding "consultation" at the time. At most, it is harmless error, inasmuch as it did not prejudice the outcome (the

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[9] *Bennett v. Spear*, 520 U.S. 154, 173-79 (1997); *see Cabinet Mts. Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982).

transfer). The alleged error or inconsistency did not affect the agencies' primary conclusion that ESA § 7(a)(2) does not override CWA § 402(b). The later, secondary clarification regarding no "consultation" duty is consistent with the primary conclusion. Further, at this point any error is harmless, because the agencies have now provided a more complete analysis.

Thus, this Court should decide the central substantive issue in this case: Does ESA § 7(a)(2) override directives and limitations Congress has prescribed in other statutes? That is a recurring issue of broad significance. The opinion below threatens to alter "*every* categorical mandate to *every* federal agency." *Defenders*, 450 F.3d at 399 n.4 (Kozinski, J., dissenting) (Fed. Pet. 78a). It is an issue on which there is a mature split in the circuits, and to which 20 lower courts have provided irreconcilable answers.[10]

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[10] Merely vacating the panel opinion would not eliminate the conflicts. While the opinion below is in the minority, it is not the sole outlier. *See, e.g.*, *Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1289-93 (S.D. Fla. 2005), *appeal pending*, No. 05-16374-II (11th Cir.) (ESA § 7(a)(2) limits FEMA's flood insurance program).

Most pertinent to *Amicus* CropLife, the Ninth Circuit at least implicitly found that ESA § 7(a)(2) overrides other laws in *Washington Toxics Coal. v. U.S. Envtl. Prot. Agency*, 413 F.3d 1024 (9th Cir. 2005). That opinion concerned the remedy when ESA § 7(a)(2) consultation was required on pesticides that EPA had earlier registered under FIFRA. FIFRA provisions specify the conditions for, and limitations on, temporarily suspending a pesticide use due to impacts on listed species. 7 U.S.C. §§ 136(*l*) (definition of "imminent" hazard" as an "unreasonable hazard to the survival of" an ESA-listed species), 136d(c) (EPA may suspend a pesticide use only if "necessary to prevent an imminent hazard"). The panel rejected the arguments of EPA and intervenor CropLife that the specific FIFRA provisions constrained the authority of agencies and courts to enjoin or suspend a pesticide use in certain areas. The panel found "an agency cannot escape its obligation to comply with the ESA merely

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C. EPA Did Not Act In An Arbitrarily Inconsistent Manner

The other portion of the question posed by this Court is whether the court below correctly held that EPA's decision to transfer NPDES permitting authority to Arizona was arbitrary because it was based on inconsistent interpretations of ESA § 7(a)(2). The material below explains why the answer is "no."

1. It is true that EPA and FWS agency staff at various levels were feeling their way through difficult issues as they considered whether and how ESA § 7(a)(2) applied to a CWA § 402(b) transfer with respect to Arizona. Local and regional staff of EPA and FWS – without definitive legal advice – offered different views as the issue was "elevated" from local to regional to national levels. *See Defenders*, 420 F.3d at 952-54 (Fed. App. 6a-12a).

The details about what EPA said at what earlier time should be irrelevant or harmless error at this point. *See*. Section I.B, above.

2. With respect to EPA's alleged arbitrariness, it is highly significant that, in a similar CWA § 402(b) transfer setting, the Fifth Circuit stated "Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action," but neither the ESA nor CWA § 402(b) allows EPA to withhold or condition a transfer

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because it is bound to comply with another statute" – the "FIFRA remedies [do not] trump those Congress expressly made available under ESA." 413 F.3d at 1032, 1034; *see id.* at 1034-35 ("the appropriate remedy for [procedural] violations of the ESA consultation requirements is a [substantive] injunction," even if the injunction countermands the FIFRA suspension provisions).

based on impacts to listed species. *AF&PA v. EPA*, 137 F.3d at 297-99 (ESA § 7(a)(2) "confers no substantive powers"; "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA"). *Agency staff can scarcely be found arbitrary for following the leading circuit court opinion of the era that EPA is required "to consult."*

3. Another reason why EPA was not arbitrary is that nothing in the ESA bars an agency from being careful by *voluntarily* initiating consultation on any action. ESA § 7 states that each "Federal agency shall, in consultation with" the Services, "insure that any action authorized, funded, or carried out" by an agency is not likely to jeopardize a listed species with extinction. 16 U.S.C. § 1536(a)(2). An agency like EPA can responsibly decide to "insure" by consulting even if consultation may end up not being legally required. Moreover, such a "consultation" furthers the "conservation" objective of ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1), even if consultation is not technically required by § 1536(a)(2).

Consulting in such a grey area eliminates a litigation issue over whether "consultation" is legally required where the ultimate conclusion, as here, is that the agency action substantively satisfies ESA § 7(a)(2). Successfully completing an arguably optional process is rational, not arbitrary, because it *eliminates* (not creates) litigation issues.[11] And again, EPA staff did not act arbitrarily by

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[11] For example, agencies often prepare an environmental impact statement ("EIS") to remove an issue from litigation, where there is a concern that some court would find that an EIS is required by the National Environmental Policy Act ("NEPA"). Where an EIS has been prepared, courts normally do not consider the issue of whether the agency acted arbitrarily in choosing to prepare an EIS. This is particularly true where the EIS is found to have satisfied

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consulting in light of a Fifth Circuit opinion that the ESA "requires EPA to consult." *AF&PA v. EPA*, 137 F.3d at 298. EPA's approach was careful, not arbitrary.

4. Assuming *arguendo* that the details of EPA's final action – its transfer of NPDES authority to Arizona at 67 Fed. Reg. 79,629 (Dec. 30, 2002) – are pertinent, they do not demonstrate any clearly inconsistent EPA positions.

To begin with, Judge Kozinski undoubtedly is correct that the disagreements among lower-level staff are meaningless. The "agency's final action . . . is the only one we are entitled to review. *See* 5 U.S.C. § 704." *Defenders*, 450 F.3d at 396 (Fed. App. 71a). A preliminary ruling by a "subordinate official" is not reviewable final agency action. *E.g., Dalton v. Specter*, 511 U.S. 462, 469-70 (1994); *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967). And, as equitable estoppel does not apply against the government, the agencies' views can evolve and change over time. *Office of Personnel Mgmt. v. City of Richmond*, 496 U.S. 414, 419-23 (1990).[12]

(continued) . . .
NEPA. Similarly here, if this Court finds that the agencies satisfied ESA § 7(a)(2), the issue of whether EPA acted arbitrarily in initiating consultation falls by the wayside.

[12] *See Schweiker v. Hansen*, 450 U.S. 785, 788-90 (1981). An agency's final view may differ from the view of some staff, and the agency's current view obtains judicial deference. *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-86 (2005); *Santa Fe Pacific R.R. v. United States*, 294 F.3d 1336, 1343 (Fed. Cir. 2002); *Springfield, Inc. v. Buckles*, 292 F.3d 813, 819-20 (D.C. Cir. 2002). The existence of disagreements within the agencies signifies the questions were "difficult," not that the agency acted arbitrarily. *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16, 22 (D.D.C. 2001).

Accordingly, if the Court disregards the later clarification of the agencies' position found in Fed. App. 93a-116a, the reviewable final agency actions are FWS's reasoning in its biological opinion, and EPA's final action in approving the transfer based on that opinion. *Bennett v. Spear*, 520 U.S. at 177-79. Those actions do not show that EPA was arbitrarily inconsistent.

a. FWS's reasoning in the final biological opinion was that EPA's transfer of NPDES permitting authority was compelled by CWA § 402(b), and was not the "cause" of any impacts to listed species that are within the purview of ESA § 7(a)(2).[13]

This is very close to the position EPA had earlier summarized in the "elevation" document.[14]

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[13] *See* NAHB Pet. App. 80, 111-17. The "transfer of the permit authority will not cause the continued real estate development" – the potential impacts to listed species that might occur from private development are not "indirect effects of the approval action." *Id.* 80, 114. The "absence of the section 7 process" for State-granted NPDES permits "reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." *Id.* 114. "EPA Region 9 has determined that it does not have the legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS. . . . . We defer to EPA in regard to its interpretation of the CWA." *Id.* Thus, FWS at least implicitly found that, where a statute (like CWA § 402(b)) does not confer the authority to act based on wildlife impacts, the federal agency is not taking a "discretionary" action within the meaning of 50 C.F.R. § 402.03 which is subject to ESA § 7(a)(2).

[14] "EPA Region 9 also believes that its approval action, which is an administrative transfer of authority, is not the cause of future non-water-quality-related impacts on endangered species from projects requiring State NPDES permits. . . . EPA Region 9 notes . . . that section 402(b) of the CWA states that EPA 'shall' approve the

(continued....)

Accordingly, the contemporaneous final view of both EPA and FWS was that EPA is not the "cause" of impacts which the agency lacks discretionary authority to control under CWA § 402(b). In other words, ESA § 7(a)(2)'s substantive constraints operate only where the agency has the discretionary authority to make a decision based on wildlife concerns under its organic law. This aspect of the agencies' contemporaneous position does not differ materially from Federal Petitioner's current position.

As there has been no change in *that* interpretation, there is no arbitrary inconsistency that might affect the desirability of rendering a decision on the merits. Hence, the Court should provide guidance on whether ESA § 7(a)(2) is an overriding substantive constraint, or instead operates only where the agency has the discretionary authority to make a decision based on wildlife concerns under its organic law.

b. EPA and FWS did not take the further step of contemporaneously considering that, as a potential consequence of their final position, not even the procedural "consultation" aspect of ESA § 7 would apply to a transfer compelled by CWA § 402(b). Since the agencies have proffered a consistent interpretation of ESA § 7(a)(2) now, this seems to render moot the question regarding whether EPA had earlier been arbitrarily inconsistent. *See* Section

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(continued) . . .
state program if it meets certain specified criteria pertaining to protection of water quality, permitting procedures, and enforcement. Based on this language, the U.S. Court of Appeals for the Fifth Circuit has held that EPA lacks authority to condition its approval of a State's NPDES program on requirements (specifically requirements related to protection of listed species) that are not specifically enumerated in section 402(b) of the CWA." NAHB App. 564-65.

I.B, above. If that question is inconsequential now, EPA was *not* arbitrarily inconsistent for several reasons.

First, EPA's final action does not definitively state a legal interpretation that ESA § 7 consultation applies procedurally, but that § 7(a)(2)'s substantive constraints do not apply. *See* 67 Fed. Reg. 79,629 (Dec. 30, 2002).

Second, EPA's explanation upon approving Arizona's program can be comfortably read to mean that EPA has successfully completed whatever "consultation process [is] required by ESA section 7(a)(2)," without purporting to resolve whether consultation is legally required. *Id.* EPA could then make the transfer without dwelling on the then-unimportant question of whether "consultation" was legally required. Judge Kozinski is correct that this "perfectly logical sequence of events" is not "'nonsensical' and impermissible." *Defenders*, 450 F.3d at 397 (Fed. App. 73a). The panel's surmise confuses the preliminary views of EPA staff[15] with EPA's final action. Agencies should not be found arbitrary based on such speculation.

Third, the Fifth Circuit's opinion that the ESA "requires EPA to consult" (*AF&PA v. EPA*, 137 F.3d at 298) still may have exerted a strong influence at the time of the Arizona program approval. EPA did not act arbitrarily simply because it did not question, and perhaps followed, that appellate ruling.

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[15] Looking at the record in a manner favorable to Respondents, the view of Terry Oda, the Manager of the CWA Standards & Permits Office in EPA Region IX, and the staff who prepared the biological evaluation for that Office, was that EPA must initiate formal ESA consultation. NAHB App. 583-88. But the views of agency staff do not bind the agency. *See* note 12, above. For this reason as well, there is no meaningful arbitrariness in EPA's final position.

EPA and FWS have now eliminated any arguable inconsistency by explaining why ESA § 7(a)(2) consultation does not apply to CWA § 402(b) transfers. Fed. App. 96a-102a, 104a-110a. After the panel opinion made this an issue, EPA and FWS stated consistent positions in their rehearing petition, in an exchange of high-level agency letters, and in the petition for certiorari. As a result, the Court should reach the issue of whether ESA § 7(a)(2) consultation applies to transfers compelled by CWA § 402(b).

II. ESA § 7(a)(2)'s Elements On "Consultation" And Jeopardy-Avoidance May Not Apply To Precisely The Same Agency Actions

In this Section, *Amicus* provides an alternative basis for finding that EPA was not arbitrarily inconsistent. There is substantial authority that the types of "agency actions" to which procedural ESA § 7 "consultation" duties attach are *not identical* to the "agency actions" to which ESA § 7's substantive constraints apply. Accordingly, any earlier EPA recognition of that difference is not arbitrary.

Further, it bears emphasizing that, under ESA § 7 rules (including rules ratified by Congress), only a limited class of agency actions require "consultation" with the Services. The Court's recognition of those uncontested rules would avoid an inadvertent ruling that a duty to "consult" with the Services attaches to each and every federal agency action where the federal agency has discretion under its organic statutes to act based on impacts to wildlife. The delays associated with such a broad "consultation" duty on the thousands of actions agencies take each day would create gridlock.

The court below assumed, and then held, that "[*b*]*oth* the consultation obligation and the obligation to 'insure' against

jeopardizing listed species are triggered by 'any action authorized, funded, or carried out by' a federal agency." *Defenders*, 420 F.3d at 961 (Fed. App. 26a). Later, the court below interpreted ESA § 7(a)(2) to create overriding duties that apply to each and every federal agency action. ESA § 7(a)(2) "confers authority and responsibility in agencies to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments." *Defenders*, 420 F.3d at 967 (Fed. App. 38a-39a).

Yet, the "agency actions" on which procedural "consultation" with the Services are conducted need not be the same as the "agency actions" to which ESA § 7(a)(2)'s substantive constraints apply.

1. In some circumstances, "consultation" could cover a *broader* range of actions. Nothing in the ESA bars an agency from *voluntarily* initiating consultation on any action, even if consultation is not clearly mandatory. That is what happened here. EPA did not act arbitrarily by being conservative and careful. *See* Section I.B and C.

2. Conversely, there is substantial authority that "consultation" with the Services is required only for a narrower subset of actions that are within the set of "action[s] authorized, funded, or carried out" by federal agencies. That is, action-specific "consultation" applies to a *narrower* class of actions than do ESA § 7(a)(2)'s substantive constraints.

The four Justices who reached one aspect of standing seemed to reason that, under the structure of ESA § 7(a)(2), the action agency has the "responsibility for determining statutory necessity" for "consultation." *Lujan v. Defenders*,

504 U.S. at 568-69. Their reasoning strongly implies that agencies such as EPA have some discretion over the types of actions on which they will consult.

Further, under uncontested ESA § 7 rules, action-specific "consultation" with the Services is required or suggested[16] only for a subset of the thousands of "agency actions" that federal agencies do take – and need to take – each day.

a. The standard or default ESA § 7 rules do not require action-by-action consultation with the Service as a prerequisite to taking any and every "agency action." Those rules create three levels of § 7 procedures.[17] This triage

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[16] We say "suggested" because the position of the United States, and the apparent view of the four Justices reaching the issue, is that the Services' 50 C.F.R. Part 402 rules do not bind other agencies. *Lujan v. Defenders*, 504 U.S. at 568-71.

[17] The first level in the triage system allows actions to go forward with *no consultation with the Services* unless the action agency concludes the action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a) (2006); *see* 50 C.F.R. § 402.04(a)(2) (1979) (the similar predecessor ESA § 7 rules, adopted in 1978). This avoids delaying the myriad actions federal agencies take each day that plainly do not affect listed species.

A second level of ESA § 7 procedures is provided for federal actions that are "not likely to adversely affect listed species or critical habitat" ("NLAA actions"). For the NLAA category of actions, the default rules require only "informal consultation" with the Service. 50 C.F.R. §§ 402.13(a), 402.14(b). Informal consultation ends the ESA § 7 procedures if "it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat." *Id.* As informal consultation does not produce the Service's written biological opinion or the incidental take statement described in ESA § 7(b), 16 U.S.C. § 1536(b), it arguably is not "consultation" in some ESA § 7 senses.

The third level is "formal consultation." 50 C.F.R. § 402.14. Only formal consultation contains all the "consultation" elements (continued....)

system helps deploy limited ESA resources effectively and efficiently. It also avoids unwarranted delays in federal actions that do not present significant issues regarding substantive compliance with ESA § 7(a)(2).

As a district court recently held in the context of affirming some special ESA § 7 rules on consultation, Congress ratified the concept that ESA § 7 consultation is not required on every agency action. "[B]ecause Congress reviewed the [nearly identical] default consultation procedures in 1978, and passed ESA amendments codifying them, the Court must conclude that Congress" ratified 1978 rules that do *not* require "consulting the Services if [the action agency] concluded that [the action] had 'no effect' on listed species and their critical habitat." *Defenders of Wildlife v. Kempthorne*, No. 04-1230 (GK), 2006 WL 2844232 at *19 (D.D.C. Sept. 29, 2006). That is, the 1978-adopted ESA § 7 rules, like the current rules (adopted in 1986), require no "consultation" at all on proposed federal actions the action agency finds would not affect listed species. 50 C.F.R. § 402.04(a)(3) (1979); 50 C.F.R. § 402.14(a) (2006).

The district court correctly found that, in the *1978* ESA Amendments, Congress acquiesced in those rules.[18] Further,

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described in ESA § 7(b), such as the Service's preparation of a written biological opinion. The default rules only require formal consultation on an individual action that is "likely to adversely affect listed species or critical habitat." 50 C.F.R. § 402.14(b).

[18] The legislative history of the 1978 ESA Amendments demonstrates that Congress was aware of, and acquiesced in, the 1978 ESA § 7 rules:

> The basic premise of S.2899 is that the integrity of the interagency consultation process designated under section 7 of
>
> (continued....)

in *1979*, Congress amended the ESA to conform to the Services' ESA § 7 regulations and other law:

> The amendment, which would require all Federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the adverse modification of critical habitat, brings the language of the statute into conformity with existing agency practice.

H.R. Conf. Rep. No. 96-697 at 12, 1979 U.S.C.C.A.N. 2572, 2576. Finally, in the *1982* ESA Amendments, Congress adopted portions of the ESA § 7 rules as statutory standards.[19]

(continued) . . .

> the act be preserved . . . . The Conferees felt that the Senate provision, by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 95-1804 at 18, 1978 U.S.C.C.A.N. 9484, 9486. The Senate Report quotes approvingly that, "[u]nder the current section 7 regulations, Federal agencies have the responsibility to identify activities or programs which they undertake that may affect listed species or their critical habit and to request consultation with the Services concerning those activities or programs." S. Rep. No. 95-874, at 6 (1978). Where Congress is aware of regulations and amends the statute in other respects, Congress presumptively has acquiesced in the regulatory interpretation. *E.g., Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *Bob Jones Univ. v. United States*, 461 U.S. 574, 601-02 (1983). Thus, Congress acquiesced in the regulatory view that consultation with the Services is not required on every federal agency action.

[19] ESA § 10(a)(2) allows the Services to issue incidental take permits on certain conditions. One condition is that the incidental "taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv). The Conference Report describes that language as adopting the regulatory standard for substantive compliance with ESA § 7(a)(2):

(continued....)

All of this illustrates a legislative policy of acquiescence and deference to the Services' view of the flexibility in ESA § 7. In sum, Congress and the Services have clarified that "consultation" with the Services is not a legal prerequisite to each and every "action authorized, funded, or carried out" by a federal agency.

b. Of further relevance, the Services have adopted two alternative sets of ESA § 7 compliance procedures for time-sensitive projects. They are called "joint counterpart rules" and they "supersede[ ]" the ESA § 7 default rules. 50 C.F.R. § 402.04. One set of rules concerns EPA pesticide registration actions under FIFRA. 50 C.F.R. §§ 402.40-402.48 (2006), 69 Fed. Reg. 47,732 (Aug. 5, 2004). The other set of ESA counterpart rules concerns approval of projects implementing the National Fire Plan. 50 C.F.R. §§ 402.30-402.34 (2006), 68 Fed. Reg. 68,254 (Dec. 8, 2003).

Both sets of counterpart rules draw on, and extend, the flexibility in § 7 procedures found in the default rules. The primary innovation in both sets of counterpart rules is eliminating the need to obtain the Service's sign-off in

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> The Secretary would base his determination as to whether or not to grant the permit, in part, by using the same standard as found in section 7(a)(2) of the Act, as defined by Interior Department regulations, that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild.... [This Act uses] regulatory language adopted by the Secretary of the Interior to implement section 7(a)(2).

H.R. Conf. Rep. No. 97-835, at 29 (1982), 1982 U.S.C.C.A.N. 2860, 2870; *see* 50 C.F.R. § 402.02 (definitions of "jeopardize the continued existence" and "destruction or adverse modification"). *Congress deferred to the Services' rules* on standards for ESA § 7 compliance.

informal consultation (*see* 50 C.F.R. § 402.13) on an action that the action agency concludes "may affect" but is "not likely to adversely affect" listed species. 50 C.F.R. §§ 402.33, 402.45. No action-specific "consultation" with the Services is conducted on those NLAA actions. The alternative procedures adopted by the Services and Service oversight provide a level of programmatic "consultation" satisfactory to the Services.

The Services explained their reasons for adopting these innovations in the preambles to the counterpart rules. One reason is to create a more efficient process. Since informal consultation still requires the review and concurrence of the Services' overworked biologists, significant delays have been common.[20] There is a reasonable position that these delays are unnecessary. A proposed action that is not likely to adversely affect even one member of a listed species clearly would be approved under § 7(a)(2), which only prohibits a federal action likely to jeopardize the continued

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[20] The Government Accountability Office ("GAO") has described that, for the reviewed Service offices in the Pacific Northwest, "nearly 40 percent of the 1,548 consultations completed by the Services exceeded established timeframes," and the "Services missed established timeframes, most often for informal consultation." *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* at 14 (GAO-04-93 March 2004). The principal reasons for delays included: (1) "the Services told us that they still do not have enough resources to handle their consultation workloads"; (2) "[s]taffing level problems are exacerbated by high turnover of biologists at the Services"; (3) "action agency officials thought the documentation needed for the consultation process was similarly getting out of control"; and (4) "biologists at the Services are sometimes unfamiliar with action agency programs and activities," which "can lengthen the consultation process." *Id.* at 40, 42, 50, 53. The GAO Report (at 19-39, 60) looks favorably on efforts to improve the § 7 consultation process, including greater use of programmatic consultations.

existence of the *entire* listed species. Thus, the innovation allows limited ESA § 7 "consultation" resources to be devoted to the subset of agency actions that may pose legitimate questions on substantive compliance with § 7(a)(2)'s standards.

Both sets of ESA counterpart rules were challenged by environmental groups. Those rules have received different receptions in two district courts.

The rules for National Fire Plan projects were sustained under an analysis that ESA § 7 provides flexibility on which actions require consultation with the Services. *Defenders of Wildlife v. Kempthorne*, 2006 WL 2844232 at *13-19. "The ESA language at issue requires 'consultation' on projects that might affect a listed species, but leaves room for the Secretary to determine how, precisely, that consultation should occur.... [T]he Court cannot find that the Counterpart Rules are inconsistent with the ESA's 'consultation' requirement." *Id.* at *19. District Judge Kessler noted that, if Plaintiffs were correct that ESA § 7 requires "consultation" before any federal action can be taken, the longstanding ESA § 7 default rules "would be invalid because [they do] not mandate consultation on each and every federal action." *Id.*

Another district court set aside, for several perceived errors, portions of the ESA § 7 counterpart rules for EPA's pesticide registration program under FIFRA. *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006), *appeals pending*, Nos. 06-35873, 06-35891, 06-35899 (9th Cir.). One basis was the panel's ruling in the case at bar: *Defenders* creates a binding Ninth Circuit precedent that "*Both* the consultation obligation and the obligation to 'insure against jeopardizing listed species are triggered by 'any action authorized, funded, or carried out by

such agency,' and *both* apply if such an 'action' is under consideration." *Id.* at 1177-78 (quoting *Defenders*, 420 F.3d at 961). Thus, under the logic of *Washington Toxics* and the panel opinion in *Defenders*, both the ESA § 7 default rules and counterpart rules are unlawful, as they do not require "consultation" on every and "any action authorized, funded, or carried out by such agency."

c. In view of the information presented above, CropLife urges the Court to avoid incidental statements about the scope of ESA § 7(a)(2) "consultation" that might undercut the legality of the ESA § 7 rules.

d. The history and context provided above on "consultation" illustrate two broader, concluding points. First, it is not entirely accurate to say that one "would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). As shown above, ESA § 7 is ambiguous as to when "consultation" is required. Legislative intent and longstanding § 7 rules refute what might be one of several alleged plain meanings of the statutory text.

Similarly, CropLife trusts that Petitioners and other *amici* will show that the "utilize their authorities" language in 16 U.S.C. § 1531(c)(1) and in the original ESA § 7 (87 Stat. 892 (1973)) allows the agencies to construe ESA § 7 as only directing federal agencies to "take steps within their power" under their organic statutes to protect listed species, where non-ESA law allows the agency to make decisions based on wildlife concerns. *TVA v. Hill*, 437 U.S. at 183 (quoting the House manager's description of the Conference bill). The scope and meaning of ESA § 7 are not that plain after all.

Second, as ESA § 7 is ambiguous, courts should defer to the agencies' reasonable construction. "When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary." *Babbitt v. Sweet Home Chapt. of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) (sustaining FWS's regulation defining the "harm" form of ESA § 9 "take" of listed wildlife). "Fashioning appropriate standards" involves a "complex policy choice" which is primarily for the expert agencies. *Id.* If "Congress did not unambiguously manifest its intent to adopt respondents' view," the agencies' "reasonable [interpretation] suffice[s] to decide this case." *Id.* at 703. Those guideposts apply equally to ESA § 7.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Nos. 06-340, 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOR THE FEDERAL WATER QUALITY COALITION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* FOR THE FEDERAL WATER QUALITY COALITION IN SUPPORT OF PETITIONS FOR WRIT OF *CERTIORARI*

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Federal Water Quality Coalition (the "Coalition") is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made under the federal Clean Water Act (the "CWA") (33 U.S.C. § 1251, *et seq.*).[2] Coalition member entities or their members own and operate facilities located on or near waters of the United States. These entities operate pursuant to individual or general National Pollution Discharge Elimination System ("NPDES") wastewater or stormwater permits, which were issued by EPA or, if EPA

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1. Pursuant to Rule 37.6 of the Rules of the Court, the Federal Water Quality Coalition states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the Coalition, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

2. Consent by all of the parties has been given to the Coalition for filing this brief. Petitioners National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association; Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller; and the State of Arizona have submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The United States Environmental Protection Agency ("EPA"), who has separately filed a Petition for writ of *certiorari* in this matter, has provided written consent to the Coalition to file this brief. The Coalition submitted EPA's consent letter to the Court concurrent with its filing of this brief.

has transferred permitting authority pursuant to section 402(b) of the CWA (33 U.S.C. § 1342(b) ("CWA § 402(b)")), by state water quality agencies.

The Ninth Circuit decision interpreted section 7(a)(2) of the federal Endangered Species Act (16 U.S.C. § 1536(a)(2) ("ESA § 7(a)(2)")), as imposing an additional requirement on CWA § 402(b) transfer decisions that is not contained in the CWA. This new requirement would directly affect the administration of the NPDES permitting program as it is applied to Coalition members. The facilities of Coalition members are now regulated by 45 state-administered NPDES programs.[3] If broadly adopted and applied, the Ninth Circuit decision, in direct conflict with the plain language and legislative intent of the CWA and decisions of other federal circuits, would now require those state-administered programs to comply with ESA § 7(a)(2), even though that statute's scope is expressly limited to federal agency actions. As a result, states may be required to develop burdensome procedures to consult with the United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "ESA Services") to insure that the issuance of NPDES permits are not likely to jeopardize the existence of endangered species in compliance with ESA § 7(a)(2). Implementation of such procedures would significantly delay state issuance of NPDES permits, and would lead to more burdensome permits for the regulated community, including Coalition members. If a state cannot demonstrate to EPA that its administration of its NPDES program complies with ESA § 7(a)(2), EPA could be forced to withdraw its approval of the NPDES program and resume authority for issuing that state's wastewater and stormwater discharge permits. Because the responsibility for administering as many as 45 state NPDES programs could revert to EPA, the permitting process would potentially drain EPA's resources and drastically hamper the

3. The State of Alaska has indicated that it is developing an application for the transfer of NPDES permitting authority.

regulated community's ability to obtain timely discharge permits. In either case—whether permitting authority remains with the states or reverts to EPA—regulated entities, including Coalition members, will be adversely affected. Therefore, the Coalition and its members have an interest in maintaining the current, well-established NPDES program, which will be undermined by the Ninth Circuit decision.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The Ninth Circuit decision imposes an additional requirement on the implementation of the NPDES program that is not contained in CWA § 402(b); in fact, that new requirement directly conflicts with the language and legislative intent of the CWA. The Ninth Circuit ruled that pursuant to ESA § 7(a)(2), EPA must insure that any action to transfer NPDES permitting authority to a state under CWA § 402(b) is not likely to jeopardize the continued existence of any endangered species. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 967 (9th Cir. 2005). The Ninth Circuit held that EPA failed to comply with ESA § 7(a)(2) in transferring NPDES permitting authority to the State of Arizona, as evidenced, according to the court, by the mere fact that Arizona, as a state agency, is not required to comply with the consultation requirement of ESA § 7(a)(2). *Id.* at 971. Based on that holding, the Ninth Circuit vacated EPA's transfer approval, despite the fact that the plain language of CWA § 402(b) mandates that EPA "shall approve" the transfer of permitting authority. *Id.* at 979.[4]

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4. The Ninth Circuit specifically held that "the EPA's transfer decision will cause whatever harm may flow from the loss of *section 7* consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer." *Defenders of Wildlife*, 420 F.3d at 971 (emphasis in original).

The Petitions for writ of *certiorari* should be granted for three reasons. First, the Ninth Circuit decision directly conflicts with opinions from two other circuits: *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) and *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992).[5] Indeed, the Ninth Circuit acknowledged the conflict between its decision and the decisions from the Courts of Appeals for the Fifth and District of Columbia Circuits. *Defenders of Wildlife*, 420 F.3d at 970. This conflict has been raised in all of the Petitions

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5. In *American Forest*, the Fifth Circuit considered the exact question that was presented to the Ninth Circuit. *See* 137 F.3d at 297 ("The key question is whether EPA may deny a state's proposed program based on a criterion — the protection of endangered species — that is not enumerated in § 402(b).") Unlike the Ninth Circuit, the Fifth Circuit found that:

> [t]here is no hint that Congress intended to grant EPA authority to erect additional hurdles to the permitting process beyond those expressly noted in § 402(b). . . . The statute's plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command 'shall approve,' [the CWA] cannot be construed to allow EPA to expand the list of permitting requirements.

Id. at 298.

The Ninth Circuit decision also conflicts with the District of Columbia Circuit's decision in *Platte River*. In that case, the petitioners asserted that section 7 of the ESA required the Federal Energy Regulatory Commission to impose endangered species-related provisions in a hydropower project license that already protected endangered species. The District of Columbia Circuit disagreed, stating "[w]e think the Trust's interpretation of the ESA is far-fetched. As the Commission explained, the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Id.* at 34 (emphasis in original).

for writ of *certiorari*, and the uncertainty created by the circuit conflict will have an adverse impact on the regulated community. For this reason alone, the Petitions should be granted.

Second, the issue decided by the Ninth Circuit involves a federal issue of significant importance. The Ninth Circuit decision essentially writes a new requirement into CWA § 402(b), contrary to the plain language of that statute. The statute imposes a mandatory duty on EPA to transfer authority to the states if nine specifically enumerated requirements are met.[6] The Ninth Circuit decision will allow ESA § 7(a)(2) to override this mandatory agency action. This concern has also been raised by all of the Petitioners and provides an independently sufficient reason for granting the Petitions.

In addition to the adequate reasons raised by the Petitioners, the Petitions for writ of *certiorari* should be granted because of the broad adverse effect the Ninth Circuit decision will have on EPA, state agencies, and the entities they regulate, including Coalition members, without any indication from Congress that such an impact is warranted. The legislative intent behind the NPDES program, as well as the CWA generally, is to allow the states to take a primary role in the regulation of pollutant discharges to their waters. 33 U.S.C. § 1251(b). The Ninth Circuit's disregard of this intent undermines the well-established system that has resulted in the mandatory EPA transfer of NPDES permitting authority to 45 states over the last 33 years.[7]

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6. There is no dispute that the State of Arizona met the requirements of sections 402(b)(1)-(9) of the CWA. *Defenders of Wildlife*, 420 F.3d at 963, n. 11.

7. The first state that EPA transferred NPDES permitting authority to was California on May 14, 1973. *See* National Pollution Discharge Elimination System (NPDES): Specific State Program Status (visited October 27, 2006) <http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific>.

The Ninth Circuit decision determined that strict state compliance with ESA § 7(a)(2) is the only means to ensure that state actions are not likely to jeopardize endangered species. As a result of that decision, in order for current state programs to maintain their NPDES authority or new state applicants to obtain a transfer pursuant to CWA § 402(b), states would apparently be required to adopt burdensome new mechanisms in strict compliance with the requirements of ESA § 7(a)(2). If the Ninth Circuit decision is left to stand, EPA could be required to revisit its CWA § 402(b) transfer decisions, and withdraw approval of state NPDES programs, regardless of independent state efforts to protect endangered species, if full state compliance with the requirements of ESA § 7(a)(2) cannot be demonstrated. 33 U.S.C. § 1342(c). This withdrawal directly conflicts with the language and legislative intent of the CWA, which envisioned an NPDES permitting program that would primarily be administered by the states, as is the case today. A broad withdrawal of state NPDES authority would have serious, widespread effects. EPA would be burdened by the return of permitting authority and would have its resources exhausted by the increased volume of new permitting decisions, potentially leading to burdensome delays on regulated facilities seeking permits. The Ninth Circuit decision unjustifiably undermines the NPDES system that EPA and the states have carefully developed for more than three decades.

The Ninth Circuit decision would also unreasonably shift statutory power to the ESA Services, as administrators of the ESA. Because there is no indication that the Ninth Circuit limited its decision to apply ESA § 7(a)(2) only to CWA § 402(b), EPA would apparently be required, by the logic of the decision, to consult with the ESA Services before performing numerous other mandatory EPA duties under the CWA and other environmental statutes. Moreover, all other federal agencies would also be required to consult with the ESA Services before acting under non-environmental

statutes, as recognized by the dissenting opinion on the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit: "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). The extensive effects of the Ninth Circuit decision cannot be overstated.

If broadly applied, the Ninth Circuit decision would cause substantial and unwarranted changes in the administration of the NPDES program, in violation of the CWA language and its underlying legislative intent. Because of the significant impact that the Ninth Circuit decision will have on EPA, other federal agencies, state agencies, and the regulated community, the Court should grant review.

I. The Ninth Circuit Decision Substantially And Adversely Affects The Well-Established NPDES Program In Conflict With The CWA Language And Legislative Intent.

A. Statutory framework of the NPDES program.

The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA prohibits any person from discharging any pollutant into the waters of the United States from a point source unless the discharge complies with the CWA's statutory requirements. 33 U.S.C. § 1311(a). Section 402 of the CWA ("CWA § 402") authorizes EPA to issue NPDES permits for the discharge of pollutants, provided the discharge meets particular statutory requirements. 33 U.S.C. § 1342(a). As described by the Court, "[g]enerally speaking, the NPDES

[program] requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Florida Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

The CWA also recognizes "that the States should have a significant role in protecting their own natural resources." *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). To this end, CWA § 402(b) requires EPA to transfer to states the authority to implement and administer the NPDES permit program, if a state can meet the nine requirements in sections 402(b)(1)-(9) of the CWA. 33 U.S.C. § 1342(b)(1)-(9) ("The Administrator **shall approve** each such submitted program . . . .") (emphasis added). If a state seeks a transfer of the NPDES permitting program from EPA, the governor of such a state "may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. § 1342(b). Once a state elects to implement its own program, and EPA approves such "submitted program" under the criteria of CWA § 402(b), state programs can issue permits that ensure compliance with the CWA. *Id.* Moreover, once a state permitting program is established, EPA will cease to administer the NPDES program in the state's jurisdiction and "shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless [EPA] determines that the State permit program does not meet the requirement of subsection (b) of this section . . . ." 33 U.S.C. § 1342(c).

Once EPA transfers NPDES permitting authority to a state, the state program "shall at all times be in accordance with" section CWA § 402. 33 U.S.C. § 1342(c)(2). EPA has a continuing duty to determine whether a state program is in compliance with CWA § 402. 33 U.S.C. § 1342(c)(3). If EPA

determines that a state is not complying with CWA § 402 in administering its NPDES program, EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, . . . the Administrator **shall** withdraw approval of such program." *Id.* (emphasis added). The permitting authority for that state then reverts to EPA under CWA § 402(a). 33 U.S.C. § 1342(a).

B. The Ninth Circuit decision undermines the NPDES program framework envisioned by Congress.

For the last 33 years, under CWA § 402(b), EPA has transferred authority to implement and administer the NPDES program to 45 states, including Arizona. *See* footnote 7, *supra.* In addition, the State of Alaska indicated in an *amicus curiae* brief before the Ninth Circuit that it is in the process of developing an application requesting the transfer of permitting authority under the NPDES program. The Ninth Circuit decision, however, subverts the current system that has been established by EPA's transfer of authority to the states. Under the Ninth Circuit decision, EPA could transfer permitting authority to a state under CWA § 402(b) only if the state demonstrates to EPA that it will comply with the express requirements of ESA § 7(a)(2). The Ninth Circuit decision could also require EPA to withdraw approval of state programs that are not in compliance with the requirements of ESA § 7(a)(2). 33 U.S.C. § 1342(c)(3) ("CWA § 402(c)(3)"). EPA could be required to insure that current state programs determine, in consultation with the ESA Services, that the issuance of permits under the program is not likely to jeopardize endangered species. *Id.* In other words, state-administered NPDES programs could have to strictly comply with ESA § 7(a)(2) in ongoing permit decisions as if the states were federal agencies, or EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . the Administrator shall

withdraw approval of such program." *Id.* Thus, under the Ninth Circuit decision, if EPA does not ensure ongoing state implementation of ESA § 7(a)(2) when determining whether to withdraw its approval of a current state program, EPA may violate the ESA.[8]

This application of the ESA directly conflicts with the congressional objective that states take primary responsibilities under the CWA:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction

8. The Coalition does not concede that EPA's determination of whether to withdraw permitting authority under CWA § 402(c) is an "action" for purposes of ESA § 7(a)(2). However, as explained in section II, *infra*, claims are being made that EPA's determination of whether to withdraw permitting authority is an action that requires ESA § 7(a)(2) consultation. *See Oregon Natural Res. Council v. Hallock, et al.*, Civil No. 02-1650-CO, 2006 WL 1142223, *8, 2006 U.S. Dist. LEXIS 27687, *23 (D. Or. Apr. 24, 2006); National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act — Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 3 (Apr. 19, 2006), <http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/NotI001.pdf>. If claims such as these succeed and a court decides that EPA's withdrawal determination under CWA § 402(c) is a federal action for purposes of ESA § 7(a)(2), then the logic of the Ninth Circuit decision seems to indicate that EPA would be required to withdraw NPDES permitting authority from state-administered programs based on noncompliance with ESA § 7(a)(2).

> grant program under this Act and implement the permit programs under sections 402 and 404 of this Act.

33 U.S.C. § 1251(b); *see also Ouellette*, 479 U.S. at 490 (The states have a "strong voice in regulating their own pollution," and should play a major role in protecting and preserving their own natural resources.); Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174-75 (1995) (citing the CWA as an example of "cooperative federalism," whereby the states have been granted the primary responsibility of administering and enforcing the permit program in a way that fits their objectives).

Moreover, the legislative history of the CWA indicates that it was Congress' expectation that the states have the primary role in the administration of the NPDES permitting program. S. COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. Rep. No. 92-414, at 71 (1971) ("It is expected that the States will play a major role in the administration of this program.") Congress recognized that some states already possessed the broad expertise and capability to evaluate certain categories of discharge sources, and could therefore administer the permit system within their boundaries. *Id.* at 8 ("Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries.") In addition, during hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, EPA Assistant Administrator John R. Quarles, Jr. stated:

> We are proceeding with the program that is based on trying to relate it to the existing structure of the Federal-State partnership established under the [CWA] and that structure places in the State the

> primary firing line responsibility for dealing with polluters, gathering information as to water quality conditions in the States, and prescribing levels of treatment that should be required. The Federal role is a backup role and we are trying to be more vigorous in pursuing our own responsibilities but not distort them into a fundamentally different level of responsibility.

Bills Amending the Federal Water Pollution Control Act and other Pending Legislation Relating to Water Pollution Control, Hearings before the S. Subcomm. on Air and Water Pollution of the Comm. on Public Works, 92nd Cong. 4356 (1971) (statement of John R. Quarles, Jr.). The conflict between the legislative intent of the CWA and the Ninth Circuit decision demonstrates the importance of the issue involved in this case and the substantial impact that the decision would have on the administration of the NPDES program and the CWA.

If the Ninth Circuit decision is left to stand, there would be, at least, two substantial adverse effects on the administration of the NPDES program. First, in order to avoid a denial of new applications for a transfer (such as for the State of Alaska) or a possible withdrawal of EPA's approval of current NPDES programs, states would be required to implement permitting programs that strictly comply with ESA § 7(a)(2), despite the fact that the plain language of ESA § 7(a)(2) applies only to federal agencies. 16 U.S.C. § 1536(a)(2). This required revision could have a sweeping effect on state NPDES programs, as states could have to consult with the ESA Services on all actions under the NPDES program, including decisions on individual wastewater or stormwater permits. The imposition of a direct ESA § 7(a)(2) consultation requirement on the states would drastically delay the states' ability to issue NPDES permits.

because states would now be required to wait for assessments from the ESA Services before issuing permits. Such a delay will adversely affect the regulated community; an increased delay will cause more uncertainty in planning to meet future discharge requirements, particularly if a renewed permit imposes more stringent discharge limits. Systematic delays in the NPDES system will substantially affect entities constructing new facilities or changing existing facilities, as such facilities may not be able to begin operations until EPA or a delegated state agency issues a permit. Moreover, a lengthier development period for an NPDES permit will lead to additional transaction costs (such as for additional meetings with permitting agencies and additional data collection and assessments) for obtaining a permit renewal.

The second likely effect of the Ninth Circuit decision is that EPA's review of whether state NPDES programs comply with ESA § 7(a)(2) could lead to EPA withdrawing approval of the programs. Once EPA withdraws its approval of a state NPDES program under CWA § 402(c)(3), the permitting authority for dischargers in that state would revert back to EPA under CWA § 402(a). 33 U.S.C. § 1342(a). Inevitably, the withdrawal of approval for a state program and transfer of the NPDES permitting authority back to EPA would affect the permitting process, as EPA would be required to shift its resources to handle a substantial increase in NPDES permitting applications and decisions. This result - centralizing permitting decisions with EPA - is a result that Congress was seeking to avoid in passing CWA § 402(b). This could exhaust EPA's resources on permitting decisions, due to the comprehensive and time-consuming analysis that is required for issuing NPDES permits. It is also unlikely that EPA would be able to match the volume of NPDES permits that are issued by the 45 states, leading to longer administrative processes for issuing discharge permits and an increase in the current backlog of outdated permits.

Further, EPA lacks the local expertise and knowledge of the state agencies regarding their own waterways, and would therefore need to conduct additional analysis that will further hold up the NPDES permitting process. The impact on EPA, state agencies, regulated entities and other stakeholders of potentially transferring 45 state NPDES programs back to EPA cannot be overstated. The Court should grant review to clarify the interplay between ESA § 7(a)(2) and the CWA, consistent with statutory language and legislative intent.

II. The Ninth Circuit Decision Impermissibly Shifts Authority To The ESA Services For An Assessment Of Agency Action.

Because the Ninth Circuit broadly held that ESA § 7(a)(2) effectively overrides the mandatory duties of EPA under another statute (the CWA), the ESA Services would gain significant authority under this rationale — not only under the CWA, but also under other statutes. ESA § 7(a)(2) states that each federal agency shall insure that its actions are not likely to jeopardize the existence of an endangered species "in consultation with and with the assistance of the" ESA Services. 16 U.S.C. § 1536(b). As to CWA § 402(b), the Ninth Circuit decision would impose an ongoing ESA § 7(a)(2) consultation responsibility on the states to whom EPA delegated the NPDES permitting authority. Although EPA would maintain its authority to make a determination under the nine elements of CWA § 402(b), the ESA consultation responsibility would become a 10th element, and the ESA Services would now have to be integrated into the state NPDES programs. Indeed, there are already indications that the Ninth Circuit decision is eroding the NPDES permitting program as administered by the states; multiple challenges to EPA decisions have been raised based on alleged noncompliance with ESA § 7(a)(2). *See Oregon Natural Res. Council v. Hallock, et al.*, Civil No. 02-1650-CO, 2006 WL 1142223, *8, 2006 U.S. Dist. LEXIS 27687, *23 (D. Or. Apr. 24, 2006) (Plaintiffs challenged the Oregon Department of Environmental Quality's

issuance of an NPDES permit on the ground that they had not initiated or completed a consultation with ESA Services); *see also* National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act — Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 3 (Apr. 19, 2006), <http://www.ecy.wa. gov/programs/wq/links/educate/attachments_to_noi/NofI001.pdf> (citing the Ninth Circuit decision, potential plaintiffs claimed that EPA's decision to delegate the authority to administer the NPDES program to the states requires compliance with ESA § 7). Nothing in the plain language of either the CWA or the ESA contemplates such a shift of authority to the ESA Services to be given lead authority over EPA and state implementation of the CWA and other statutes.

Moreover, the Ninth Circuit decision will fundamentally change the processes and analysis that are conducted in administering an NPDES program by either EPA or state agencies. Under CWA § 402, the focus of issuing an NPDES permit is on the pollutant discharge and whether the permit is consistent with the CWA. 33 U.S.C. § 1342(a). If ESA § 7(a)(2) is now imposed on CWA § 402, the critical inquiry will not be solely on whether the permit and the allowable pollutant discharges are consistent with the CWA, but rather the analysis will expand to address the effects of the permitted activity on endangered species. As a result, the development and issuance of an NPDES permit and the administration of the NPDES authority will fundamentally change from a focus on an analysis of pollutant discharges to an assessment of the likely effects of a project on endangered species. This shift is inconsistent with the language and intent of the CWA.

There is also no indication that the Ninth Circuit decision will be limited to EPA's duties under the CWA. The dissenting opinion on the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit recognized the potential

breadth of the decision below as potentially applying to ". . . *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). The Ninth Circuit decision would grant the ESA Services a new central role under other statutes. For example, under the federal Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. §§ 6901, *et seq.*), a state may seek "to administer and enforce a hazardous waste . . . program . . ." by submitting an application to EPA. 42 U.S.C. § 6926(b). EPA then decides whether the application satisfies three criteria. *Id.* If EPA approves a state application for administering a RCRA permitting program, then "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under" RCRA. 42 U.S.C. § 6926(d). Further, EPA has a continuing duty to determine whether a state is properly administering and enforcing a hazardous waste permitting program. 42 U.S.C. § 6926(e). If a state is not properly administrating a program and corrective action is not taken, EPA "shall withdraw authorization of such program and establish a Federal program. . . ." *Id.* In light of the Ninth Circuit decision, EPA could be required to ensure ongoing state consultation with the ESA Services for ESA § 7(a)(2) compliance before EPA can delegate RCRA permitting authority to a state. As with NPDES authority under the CWA, a state could be required to demonstrate to EPA that its RCRA permitting program complies with ESA § 7(a)(2) in order to maintain such a permitting program. Likewise, EPA could be required to withdraw its approval of a RCRA permitting program if a state does not implement procedures to demonstrate to EPA that it is in compliance with ESA § 7(a)(2).

Another example of a statute that could be affected by the Ninth Circuit's ruling is the federal Clean Air Act ("CAA") (42 U.S.C. §§ 7401, *et seq.*). Under the CAA, states were required to develop and submit to EPA a permit program within three years after the enactment of the CAA. 42 U.S.C.

§ 7661a(d). If a state program was not approved within two years, EPA was required to administer a permitting program for that state. 42 U.S.C. § 7661a(d)(3). If a state has delegated permitting authority, EPA is then charged with a continuing duty to determine whether "a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of" the CAA. 42 U.S.C. § 7661a(i)(1) & (2). If EPA determines a state is not properly administering a permitting program, EPA is required to issue a notice to the state. 42 U.S.C. § 7661a(i)(1). If the state has not come into compliance with the CAA within 18 months after the notice is issued, EPA is required to impose sanctions. 42 U.S.C. § 7661a(i)(2) (". . . the Administrator shall apply the sanction under section 179(b)."). Under the Ninth Circuit decision, states could be subject to sanctions under the CAA for noncompliance with ESA § 7(a)(2). In addition, EPA is required to object to a proposed permit from a state "[i]f any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of [the CAA], including the requirements of an applicable implementation plan. . . ." 42 U.S.C. § 7661d(b)(1) ("the Administrator **shall** . . . object to its issuance.") (emphasis added). Under the Ninth Circuit rationale, EPA could be required to object to CAA permits that are not issued in compliance with the requirements of ESA § 7(a)(2).[9]

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9. As with the CWA, there is also evidence that ESA§ 7(a)(2) is affecting the CAA permitting program. A challenge has been brought against a Prevention of Significant Deterioration ("PSD") permit based on alleged noncompliance with ESA § 7(a)(2). *See In re: Indeck-Elwood, L.L.C.*, PSD Appeal No. 03-04, slip op. at 18-19 (Environmental Appeals Board, Sept. 27, 2006) (Petitioners challenged the Illinois Environmental Protection Agency's issuance of a PSD permit in part on the ground that the state agency failed to comply with the consultation requirements under ESA § 7).

If Congress had intended for the ESA Services to have overriding authority over EPA under ESA § 7(a)(2), it could have explicitly stated so in the language of the CWA and the ESA. Absent such statutory language, the ESA should not be read to effectively repeal mandatory EPA duties under the CWA. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)) ("The intention of the legislature to repeal 'must be clear and manifest.'") In accordance with the legislative intent, the CWA and the ESA should peaceably co-exist, with neither act having preemptive power over the other. *Id.* ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed legislative intention to the contrary, to regard each as effective.") The Ninth Circuit decision impermissibly ignores the language and intent of the CWA, creating a sweeping effect on the regulated community, including Coalition members, that deserves the attention of the Court.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant the Petitions for writ of *certiorari*.

Respectfully submitted,

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Nos. 06-340 and 06-549

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In The

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*, *Petitioners,*

vs.

DEFENDERS OF WILDLIFE, *et al.*, *Respondents.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioner,*

vs.

DEFENDERS OF WILDLIFE, *et al.*, *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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DOCKET ENTRIES

U.S. Court of Appeals for the Ninth Circuit

04/03/03	PETITION FOR REVIEW DOCKETED (File date 04/03/03)
05/01/03	FILED HOME BUILDERS' MOTION TO INTERVENE WITH EXHIBITS; SERVED ON 04/29/03 (File date 05/01/03)
05/02/03	FILED STATE OF ARIZONA'S MOTION TO INTERVENE; SERVED ON 05/01/03 (File date 05/02/03)
05/02/03	FILED ARIZONA CHAMBER OF COMMERCE'S MOTION TO INTERVENE SERVED ON 05/01/03 (File date 05/02/03)
05/13/03	STATE OF ARIZONA'S, ARIZONA CHAMBER OF COMMERCE'S AND HOME BUILDERS' MOTIONS TO INTERVENE ON BEHALF OF RESPONDENT IS GRANTED (File date 05/13/03)
08/15/03	PURSUANT TO THE DISTRICT COURT'S 07/17/03 ORDER A PORTION OF THE DISTRICT COURT ACTION HAS BEEN TRANSFERRED TO THIS COURT. THE TRANSFERRED ACTION HAS BEEN ASSIGNED NO 03-72894. NOS 03-71439 AND 03-72894 ARE CONSOLIDATED. (File date 08/15/03)
09/23/03	FILED PETITIONERS' CONSOLIDATED OPENING BRIEF. (File date 09/23/03)
11/06/03	FILED RESPONDENT USEPA'S BRIEF. (File date 11/06/03)

12/19/03	RECEIVED ORIGINAL AND 16 COPIES PETITIONERS' REPLY BRIEF OF 39 PAGES. (File date 12/19/03)
09/02/04	CALENDARED: SAN FRANCISCO NOVEMBER 1, 2004 9:00 A.M. COURTROOM 1 (File date 09/02/04)
08/22/05	FILED OPINION: WE TRANSFER DEFENDERS OF WILDLIFE'S ENDANGERED SPECIES ACT AND ADMINISTRATIVE PROCEDURE ACT SUIT CHALLENGING THE VALIDITY OF THE BIOLOGICAL OPINION TO THE DISTRICT COURT WHERE IT WAS ORIGINALLY FILED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. THE PETITION FOR REVIEW IS GRANTED AND REMANDED TO THE EPA FOR PROCEEDINGS CONSISTENT WITH THIS OPINION (File date 08/22/05)
09/20/05	FILED ORDER (MARSHA S. BERZON) RESPONDENTS' MOTION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR REHEARING OR PETITION FOR REHEARING EN BANC IS GRANTED. THE PETITION SHALL BE FILED NO LATER THAN 10/20/05. (File date 09/20/05)
09/30/05	FILED ORDER (MARSHA S. BERZON) INTERVENORS' MOTION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR REHEARING OR REHEARING EN BANC IS GRANTED. THE PETITION SHALL BE FILED NO LATE THAN 10/20/05. (File date 09/30/05)

10/19/05 FILED INTERVENOR-RESPONDENT PETITION FOR REHEARING EN BANC. (PANEL ALL ACTIVE AND ANY INTERESTED SENIOR JUDGE). (File date 10/19/05)

10/20/05 FILED RESPONDENT USEPA & US FISH AND WILDLIFE SERVICE'S PETITION FOR REHEARING EN BANC. (File date 10/20/05)

11/14/05 FILED ORDER (MARSHA S. BERZON): PETITIONER DEFENDERS OF WILDLIFE IS REQUESTED TO FILE A RESPONSE TO THE PETITION FOR REHEARING EN BANC WITHIN 21 DAYS OF THE DATE OF THIS ORDER. THE RESPONSE SHALL NOT EXCEED 15 PAGES IN LENGTH. (File date 11/14/05)

12/23/05 FILED DEFENDERS OF WILDLIFE'S RESPONSE TO FEDERAL RESPONDENTS AND INTERVENORS-RESPONDENTS' PFR EB OF 22 PAGES; SERVED ON 12/22/05. (File date 12/23/05)

06/08/06 FILED ORDER DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC. (File date 06/08/06)

06/12/06 FILED INTERVENORS' JOINT MOTION TO STAY MANDATE; SERVED ON 06/12/06. (File date 06/12/06)

06/15/06 FILED INTERVENOR STATE OF ARIZONA'S MOTION FOR STAY THE MANDATE; SERVED ON 06/13/06. (06/15/06)

06/15/06 FILED RESPONDENT'S MOTION WITH DECLARATION TO STAY THE MANDATE. (File date 06/15/06)

06/16/06 FILED ORDER (MARSHA S. BERZON) INTERVENOR'S JOINT MOTION TO STAY THE MANDATE IS GRANTED. THE MANDATE IS HEREBY STAYED FOR 90 DAYS PENDING THE FILING OF A PETITION FOR WRIT OF CERTIORARI IN THE U.S. SUPREME COURT. IF SUCH A PETITION IS FILED AND IF THE WRIT OF CERT IS GRANTED BY THE SUPREME COURT THE STAY SHALL CONTINUE UNTIL DISPOSITION BY THE SUPREME COURT. (File date 06/16/06)

U.S. District Court
District of Arizona (Tucson Division)

04/17/02 1 COMPLAINT FILED (File date 4/17/02)

01/09/03 42 SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF BY DEFENDERS OF WILDLIFE, CENTER FOR BIOLOGICAL; ADDING DFT GALE NORTON, STEVEN WILLIAMS. MODIFIED ON 01/27/2003 (ENTERED 01/27/2003). (File date 01/09/03)

01/31/03 49 MOTION TO INTERVENE WITH RESPECT TO CLAIM SEVEN BY NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA. (File date 01/31/03)

01/31/03 50 DECLARATION OF CONNIE WILHELM BY HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA. MODIFIED ON 04/09/2003). (File date 01/31/03)

01/31/03 51 DECLARATION OF ALAN LURIE BY SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION. MODIFIED ON 04/09/2003. (File date 01/31/03)

06/02/03 151 ORDER BY JUDGE CINDY K. JORGENSON DENYING MOTION FOR PRELIMINARY INJUNCTION BY PLAINTIFF; WITHIN TEN DAYS OF THE ENTRY OF THIS ORDER THE PARTIES SHALL ADVISE THIS COURT WHETHER THEY WISH TO PROCEED ON CLAIM 7; AND IF NO TIMELY REQUEST IS FILED THIS COURT WILL SEVER CLAIM 7 PURSUANT TO RULE 21 FED.R.CIV.P. AND TRANSFER IT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PURSUANT TO 28 USC § 1631. (File date 06/02/03)

07/17/03 178 ORDER BY JUDGE CINDY K. JORGENSON RE: COMPLAINT (AMENDED); IT IS HEREBY ORDERED THAT: CLAIM 7 OF PLAINTIFFS' SECOND AMENDED COMPLAINT IS SEVERED FROM PLAINTIFFS' REMAINING CLAIMS, AND TRANSFERRED TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT; THE CLERK OF THE COURT SHALL FORWARD A COPY OF THIS ORDER, THIS COURT'S JUNE 2, 2003 ORDER #151, AND A COPY OF PLAINTIFFS' SECOND AMENDED COMPLAINT #42 TO THE NINTH CIRCUIT; THE NINTH CIRCUIT IS ADVISED THAT THIS MATTER IS A RELATED CASE TO THE PENDING MATTER OF DEFENDERS OF WILDLIFE V. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NINTH CIRCUIT

CASE #03-71439; AND IF ANY PARTY OR INTERVENOR WISHES ADDITIONAL PORTIONS OF THIS COURT'S RECORD TO BE FORWARDED TO THE NINTH CIRCUIT, IT SHALL PREPARE A MOTION AND/OR STIPULATION ALONG WITH A PROPOSED FORM OF ORDER THAT CLEARLY INDICATES WHICH SPECIFIC PORTIONS OF THE RECORD IT WISHES FORWARDED TO THE NINTH CIRCUIT. SUCH MOTION AND/OR STIPULATION ALONG WITH A PROPOSED FORM OF ORDER SHALL BE SUBMITTED TO THE COURT WITHIN 10 BUSINESS DAYS OF THE ENTRY OF THIS ORDER (File date 07/17/03)

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

In Reply
Refer toWTR-5

January 23, 2002

Mr. David L. Harlow
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Rd.
Suite 103
Phoenix, AZ 85021

Re: Consultation Regarding Possible Environmental Protection Agency (EPA) Approval of Program Delegation of the National Pollutant Discharge Elimination System (NPDES) Program to the Arizona Department of Environmental Quality (ADEQ) and Request for Species List

Dear Mr. Harlow:

The purpose of this letter is to request initiation of informal consultation under Section 7 of the Endangered Species Act regarding the possible approval by the EPA for ADEQ to administer the NPDES program, under the federal Clean Water Act, in Arizona. The approval does not include authorization to administer the NPDES program in Indian Country, as defined in 18 U.S.C. § 1151. The EPA received Arizona's submission for the authority to administer the program on January 14, 2002. Within 90 days of the receipt of a complete program, the EPA Administrator is required to approve or disapprove the

program. If the program is approved, ADEQ would assume the following specific activities:

- Permitting, compliance, and enforcement of individual permits for discharges from industrial, commercial, mining, and silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and, domestic wastewater treatment facilities that include publicly-owned treatment works (POTWs) and privately-owned treatment works;
- Issuance of general permits;
- Administration of the NPDES sludge (biosolids) management program;
- Administration of the NPDES pretreatment program;
- Administration of all stormwater discharge programs, including municipal storm sewer systems (combined and separate), general permits for stormwater discharges, and individual permits for stormwater only discharges; and
- Administration of the NPDES permitting, compliance, and enforcement programs for federal facilities.

A copy of the Arizona Pollutant Discharge Elimination System (AZPDES) Program Submission is enclosed.

Please provide us with a list of any threatened, endangered, proposed, or candidate species, and designated or proposed critical habitats that might be affected by these actions, and any information, recovery plans, maps, or literature citations of which the Service is aware that may be useful to us in assessing whether these actions may affect listed, proposed, or candidate species or critical

habitats. If you have any questions, please contact Jenny Mann of my staff at (415) 972-3512.

Sincerely,

/s/ Terry Oda
Terry Oda, Chief
CWA Standards and
Permits Office (WTR-5)

Enclosure

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Karen Smith
Director, Water Quality Division
Arizona Department of Environmental Quality
3033 North Central Avenue
Phoenix, AZ 85012-2809

Dear Ms. Smith:

To follow our conference call yesterday, I am writing to confirm that EPA is unable to determine the Arizona Pollution Discharge Elimination System program submission is complete. Based on our review to date, we conclude the submission is incomplete, as it appears Arizona's legal authority may not meet minimum requirements set forth in EPA's state program submission regulations. This conclusion is based on our determination that issues we identified in our letter of September 20, 2001 remain unresolved, and differences between State and federal legal authorities have not been adequately addressed. A list of concerns was included in yesterday's electronic mail message from Matthew Mitchell of our office to you and others at ADEQ.

As we discussed during the conference call, we may have additional concerns regarding the State's authority to implement a complete National Pollutant Discharge Elimination System (NPDES) program, including biosolids and pretreatment. While EPA must, within the first thirty days determine whether the program submission is

complete, the statute provides that EPA will have ninety days to make a final determination as to whether or not the application is approvable. Thus, EPA's initial review to determine whether an application is complete is not intended to be exhaustive, but rather to determine whether the application meets basic legal requirements.

We and the Office of Regional Counsel hope to have productive discussion with your office and the Arizona Attorney General's (AG's) Office on these issues, and how they might be addressed in a complete program submission. We would also like to have a draft revised AG's Statement, which addresses and explains differences between the State and federal authorities, to inform these discussions. The AG's Statement is an essential component for EPA's review of any State NPDES program submission. In certifying that the State program is at least as stringent as the federal program, the AG must demonstrate the State's authority to implement the program, and address any differences between State and federal law, explaining why the State is as stringent as the federal. EPA's NPDES State Program Guidance indicates States will send to EPA a draft application, including a draft AG's Statement, with opportunity for review prior to submittal of a formal application. As we did not receive a draft application, we were unable to provide specific feedback and seek resolution of issues until reaching this first crucial point in the forma review process.

I am confident we will continue to work together to achieve our mutual goal of delegating this program to Arizona, and believe we can resolve the issues before us.

Our lead staff person for the review, Matthew Mitchell, can be reached at (415) 972-3508, and I am at (415) 972-3572.

Sincerely yours,

/s/ Alexis Strauss 15 Feb. 2002
Alexis Strauss, director
Water Division

[Image Omitted In Printing]
Matthew Mitchell
02/28/2002 07:08 PM

To: Jane DeRose-Bamman <DeRose-Bamman.Jane@ev.state.az.us>
cc: nancy.jamison@AG.STATE.AZ.US, Michele Robertson <Robertson.Michele@ev.state.az.us>, Karen Smith <Smith.Karen@ev.state.az.us>, Mike Traubert <Traubert.Mike@ev.state.az.us>, Chris Varga <Varga.Chris@ev.state.az.us>
Subject: AZPDES issues

Jane,

I have attached one file which is a table summarizing the issues. The second file contains a fuller explanation of each issue.

These are the issues we've been able to identify in our review to date in order to comply with your request that we provide you a list of issues as soon as possible. We will continue our review and will notify you immediately if we identify any additional concerns.

We look forward to discussing the NPDES issues with you on Tuesday morning.

Matt

[File Images Omitted In Printing]
Issues Summary228.wp majorissues228.wpc

DRAFT

Arizona Program Submission – Major Issues		
Issue	**Regulatory Citation or Location in Submission**	**Status/ Resolution**
Biosolids Issues		
1. Scope of program (elements missing)	40 CFR 503.1(b) – Applicability ((b)(2) and (4) applicability to sewage sludge and land where sewage applied	
2. Direct enforceability (capability missing)	503.3(b) Direct enforceability	
3. Additional or more stringent requirements (capability limited)	503.5(a) Additional or more stringent requirements	
4. Preparer responsibility (enforcement capability against preparer for applier violation)	503.7 Requirement for a person who prepares sewage sludge	
5. Definition of sewage sludge (definition missing)	503.9(w) definition of sewage sludge	

6. Additional requirements for appliers to protect public health and safety	Subpart B Land Application 503.10 Applicability 503.10(b)(2) and (c)(2) (authority for case-by-case requirements)	
7. Selenium limit waiver	503.13 Table 1 (selenium limit)	
8. Prohibition of ESA adverse effects	503.14(a) (prohibition of adverse effects)	
9. Reclamation site (application of sewage sludge at greater than an agronomic rate)	503.14(d) (permission from permitting authority needed)	
10. Preparer's annual report	503.18 Reporting	
11. Inspection of biosolids management facilities	Resource analysis	
NPDES Issues		
12. Public participation in enforcement actions	123.27(d)	
13. Authority to issue permits to control disposal of pollutants into wells	123.28	

14. Judicial review of approval or denial of permits	123.30	
15. Affirmative defense to civil liability (broader than NPDES provision)	40 CFR 122.3(d) (AZ goes beyond scope) ARS 49-262F	
16. Description of state administrative and judicial review procedures	123.22(c)	Program description needs to be augmented
17. Charity carwash exemption and swimming pools and residential evaporative cooler bleedoff	R18-9-A902.G.8	
18. Definition of Tribal lands	A902.A.1	
19. Definition of navigable waters (State regs lack language comparable to 40 CFR 1222)	49-201	

20. Definition of toxic pollutants (limitation to those "injurious to public health")	49.201.37. There are a number of references throughout the statute and regulations to it. See also 49-255.01(F)	
21. Extent of authority for entry, inspection and sampling, etc. (authority for actual discharges v. for discharges that may occur)	49-203(B) and AG Statement at p. 9	
22. Maximum fines for criminal penalties (less stringent than 40 CFR 123.27?)	A.R.S 13-801, 802, 803. See also AG Statement at page 15	
23. Classification of penalties (as stringent as federal?)	49-263	
24. Prohibitions (applicable water quality requirements may include EPA-promulgated standards)	R-18-9-A903.3	

25. Resources for compliance with storm water regulations, CAFO regulations, and implementation of pretreatment program	Program Description	
26. Assumption that Federal contribution will continue to be 40%	Program Description	

Arizona Program Submission – Major Issues

Biosolids Issues

1. EPA rule: 503.1(b)(2), 1(b)(4): states that the biosolids regulations apply to sludge applied to the land, and to the land where sludge is applied or disposed. Allows for corrective actions to be taken in cases where preparer and applier are not found to be in violation.

ADEQ rule: no similar statement of authority:

2. EPA rule 503.3(b), known as the "direct enforceability" provision, allows enforcement against any person that engages in the use or disposal of sewage sludge without complying with the sewage sludge regulations, regardless of whether that person holds a permit for sewage sludge use or disposal.

ADEQ rule: This provision is missing and should be added or incorporated by reference to allow adequate enforcement of the ADEQ biosolids regulations. If a person does not have a permit and prepares or applies sewage sludge without complying with the regulations, ADEQ should have the ability to hold them liable.

3. EPA rule: 503.5(a): authorizes permitting authority to impose more stringent conditions (on any party) when needed to protect public health and the environment

ADEQ rule: ADEQ can place specific requirements in a permit issued to a wastewater treatment plant. It does not appear that ADEQ has authority to issue a permit to an applier with requirements above and beyond those specifically in ADEQ's rule.

Example: An applier wants to apply out-of-state biosolids in an area near an endangered species habitat. It is

desirable from the point of view of the Fish and Wildlife Service and ADEQ to have a 500' set-back from the habitat. ADEQ has no mechanism to order the applier to observe a 500' set-back in this particular case.

4. EPA rule: 503.7: holds preparer responsible for compliance with all requirements in the rule.

ADEQ rule: ADEQ can place this requirement in permits issued to wastewater treatment plants. It does not appear that ADEQ has authority to take enforcement action against a preparer if an applier violates ADEQ's rule and the preparer does not have a permit placing responsibility on the preparer.

Example: A non-NPDES POTW without a permit with sludge conditions in it contracts with a land applier who applies biosolids in excess of the agronomic rate. Under 40 CFR 503.7, EPA could penalize the POTW as well as the applier. ADEQ could penalize the applier but not the POTW.

5. EPA rule 503.9(w): defines "sewage sludge"

ADEQ rule: This definition was deleted from the final version of the ADEQ rule.

6. EPA rule 503.10(b)(2), 10(c)(2): Allows permitting authority to impose management practices on applications of "exceptional quality" biosolids when necessary to protect public health and the environment.

ADEQ rule: ADEQ could impose additional requirements on a POTW, but does not appear to have authority to impose these on an applier.

Example: An applier registers to apply pasteurized exceptional quality biosolids from a California POTW. Because of the high nitrogen content, it is desirable to require the applier to apply at the agronomic rate in order to ensure groundwater protection. ADEQ does not have a mechanism for requiring the applier to apply at the agronomic rate.

7. EPA rule 503.13 Table 1: Sets a ceiling concentration for Selenium of 100 mg/kg, with no exceptions, and a cumulative load limit of 100 kg/ha.

ADEQ rule: allows ceiling concentration for Selenium greater than 100 mg/kg, and cumulative load greater than 100 kg/ha under certain circumstances. This is essentially a waiver of the selenium limit.

Example: a small POTW that only has to monitor once per year could apply biosolids with very high selenium levels for several months but then take additional samples and meet the ADEQ standards if the average for the year is greater than 100 mg/kg. ADEQ thus could not take enforcement action in what would be a violation of 503.13. There may be an impact from short term effects of high Selenium concentrations.

8. EPA rule: 503.14(a): prohibits application of sewage sludge ***if it is likely*** to adversely affect a threatened or endangered species ***or its designated critical habitat***.

ADEQ rule: Lacks this provision, although it incorporates 503.24(a) by reference, which prohibits the surface disposal of sewage sludge if it is likely to adversely affect a threatened or endangered species or its designated critical habitat. ADEQ states that under its rule, "the issuance of a permit does not authorize any . . . infringement of

federal, state, or local law or regulations." It also notes that "the express or implied approval to use, dispose, or transport under the Articles, falls under the definition of "license" . . . including "the whole or part of any agency permit, certificate, approval, registration". However, these provisions fall short of the prohibition in 503.14(a) because an applier does not have an independent duty to avoid an adverse effect under applicable Federal law, though he has a duty to avoid a "take" under the Endangered Species Act. The current provisions in the ADEQ rule do not appear to give ADEQ authority to take enforcement action if a biosolids application adversely affects a threatened or endangered species. Furthermore, ADEQ does not have authority to take enforcement, under the Endangered Species Act, for impacts to designated critical habitat.

Example: It is found that an applier has razed the critical habitat of an endangered plant species. ADEQ does not have authority to penalize the applier. Further, it would not have the authority to penalize the preparer, as contemplated by 40 CFR 503.7 and explained in the preamble to the sewage sludge regulations.

9. EPA rule: 503.14(d): prohibits application at greater than the agronomic rate, unless, in the case of a reclamation site, it is ***specified by the permitting authority***.

ADEQ rule: The ADEQ rule sets requirements for application at a reclamation site, but does not specifically require an approval from the permitting authority to operate the site as a reclamation site.

10. EPA rule: 503.18: requires POTWs and other Class 1 Sludge Management Facilities to submit annual reports to the permitting authority with the information in 503.17.

ADEQ rule: requires applier to collect this information from the preparer and to submit it in the applier's report. It is unclear whether ADEQ could enforce against POTW if applier fails to provide preparer's report to ADEQ.

11. ADEQ lists as a responsibility conducting inspections of Class 1 Biosolids Management Facilities. It commits to only 5 inspections per year. There are 17 Class 1 facilities in Arizona. It does not commit to any inspections of other majors or minors, when necessary. There are an additional 14 majors which are not Class 1 facilities. A full inventory of minors has not been provided. There is no provision for including inspections of biosolids operations during NPDES inspections of major and minor POTWs.

NPDES Issues

12. 123.27(d): public participation in enforcement actions

State must either allow intervention as of right in any civil or administrative action to obtain remedies (injunctive and penalties) OR provide assurances that it will investigate and provide written responses to all citizen complaints, not oppose intervention, and publish notice and provide at least 30 days comment on proposed settlement of state enforcement action. Could not find.

13. 123.28: state law must provide authority to issue permits to control the disposal of pollutants into wells. AG's statement needs to address.

14. 123.30. Must provide an opportunity for judicial review in state court of the final approval or denial of permits that is sufficient to provide for, encourage and assist public participation in the permitting process. Must be as expansive as §309. Insufficient if narrowly restricts

the class of persons who may challenge the permit decision (e.g., if only permittee, or if persons must demonstrate a property interest near a discharge or injury to pecuniary interest. Judicial review of approval or denial of permits. Could not find.

15. ARS 49-262F. Affirmative defense to civil liability. State law provides an affirmative defense for violations of water quality standards or permit conditions, if from a facility that is undertaking cleanup action under CERCLA or state analog. Federal regulation exempts discharges in compliance with instructions from an OSC.

16. 123.22(c): PD needs to contain a description of state administrative and judicial review procedures.

17. R18-9-A902.G.8 – permit exemption for discharges from charity carwashes, residential swimming pools and evaporative cooler bleed-off water.

18. Section II of the MOA states that ADEQ is not seeking authorization to administer the NPDES in Indian Country, as that term is defined in 18 U.S.C. 1511. However, the regulations at A902.A.1 require ADEQ, upon EPA's approval of the State NPDES program, to give notice to all Arizona NPDES permittees, "except NPDES permittees located on and discharging to tribal lands, . . . " "Tribal lands" is not a defined term. Need to clarify use of different terms in regulations and MOA.

19. The State statute defines "navigable waters" as "waters of the U.S. as defined by §502(7) of the clean water act." The Federal statute defines "navigable waters" as "waters of the United States, including the territorial seas." "Waters of the U.S." is not defined in the Clean Water Act but in the federal regulations. Therefore, the

AG's statement should clarify that State's definition of "navigable waters" encompasses what is found in EPA's regulation and not just the Clean Water Act (which does not have a definition).

20. The package's references to "toxic pollutants" are not consistent with EPA's. Section 49-201.37 defines toxic pollutant as a substance that would cause significant adverse reactions if ingested in drinking water. Other references in the package to toxic pollutants describe them as listed under the section 307 of the Clean Water Act as "injurious to public health". EPA's definition of toxic pollutants are broader and are defined as those pollutants listed under section 307 of the Clean Water Act regardless of whether they are injurious to public health. The State's narrower definition could be problematic in establishing discharge limitations for toxic pollutants based on best professional judgement" (see 122.44), as well as for the biosolids program.

21. Arizona's Attorney General's Statement interprets the Directors authority at § 49-203(B) for entry, inspection and sampling, and applying monitoring, recording and reporting requirements, as applying to those who actually discharge. However, section § 49-203(B) also extends this authority to facilities where discharges *may occur*. Therefore, AG's Statement should be amended to be consistent with state statute and § 308 of the CWA (which extends to "point sources" which are defined to include discrete conveyances where discharges "may occur.")

22. State's criminal penalty statutes set caps on penalties for individuals and enterprises. These caps are set for felonies and for three classes of misdemeanors (see 13-801, 802, 803). Section 49-263.01.H provides "each day of

violation of any provision of the section constitutes a separate offense." How do "felony," "misdemeanor," "violation," and "offense" fit together? i.e. How do multi-day "violations" fit with penalty caps which are set per "felony" and per "misdemeanor?"

23. Prohibitions (R18-9-A903.3). Applicable water quality requirements may include those imposed by EPA (e.g., EPA-promulgated water quality standards).

24. It is not clear from the program description that the resource analysis performed by ADEQ includes the resources necessary to oversee compliance with storm water and CAFO regulations and take any necessary enforcement. In addition, the resources identified for the pretreatment program may be insufficient. Section IV states that the NPDES program regulates "approximately 150 facilities" under permit. Apparently not considered are the approximately 1,500 facilities in Arizona under storm water general permits and the approximately 100 CAFOs in Arizona. The current resource allocation appears inadequate to address this workload when compared to similar states. At a minimum, the program description should explain the resources that will be devoted to this area and the assumptions that were used.

25. The program description assumes that federal funding will provide 40% of the funds needed to meet program expenses in FY '03-FY '05. This would require federal funding to increase about 5% each year. We are concerned about a potential funding gap in the event of a shortfall in federal funding.

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

May 16 2002

Vera S. Kornylak
The Arizona Center for Law
in the Public Interest
18 E. Ochoa St.
Tucson, AZ 85701-1915

In reply, refer to WTR-5

Dear Ms. Kornylak:

I am writing in response to your letter dated April 25, 2002, in which you request USEPA's timeline with respect to the consultation process under the federal Endangered Species Act (ESA) for the State of Arizona's application to administer the National Pollutant Discharge Elimination System (NPDES) Program under the federal Clean Water Act (CWA). Section 7 of the ESA requires federal agencies to ensure, in consultation with the U.S. Fish and Wildlife Service (FWS or Service) and/or National Marine Fisheries Service (NMFS), as appropriate, that any action authorized, funded, or carried out by the federal agency is not likely to jeopardize the continued existence of any federally-listed threatened or endangered species (listed species) or result in the destruction or adverse modification of designated critical habitat for such species.

Before responding to your question regarding the timeline, we are providing you some background on this matter. On January 14, 2002, the State of Arizona, in accordance with Section 402(b) of the CWA, requested approval from the USEPA for the Arizona Department of Environmental Quality (ADEQ) to administer the NPDES

Program. On February 15, 2002, USEPA determined that the State's submittal was incomplete.[1] USEPA and ADEQ are continuing to work on the issues of concern. Based on USEPA's discussions with the State, USEPA expects that the State will be able to submit a complete application shortly.

Given the likelihood that the State would submit a complete NPDES program application in the near future, USEPA initiated informal ESA section 7 consultation with the FWS on the possible approval of ADEQ's application pursuant to the Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act dated February 22, 2001 (National MOA). (A copy of the National MOA is included for your reference.) Specifically, on January 23, 2002, USEPA initiated informal consultation with the Service in a letter requesting a species list. On May 7, 2002, the USEPA sent an electronic mail memorandum to the Service attaching a draft version of a Biological Evaluation that analyzes the potential effects on listed species and critical habitat associated with EPA's approval of the State NPDES program application. Based on a conversation I had with the Service, we hope to receive the Service's response to our draft Biological Evaluation by May 21, 2002. After reviewing the Service's comments, the USEPA

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[1] The USEPA has 30 days from receipt of a State NPDES program submission to notify the State whether its submission is complete. 40 C.F.R. § 123.21. If USEPA determines that the State has a complete program submittal, the USEPA has 90 days from the submittal date to approve or disapprove the program. See Section 402(c) of the CWA; 40 C.F.R. § 123.61(b).

will continue with informal section 7 consultation and request the FWS's written concurrence with USEPA's finding that its approval is not likely to adversely effect listed species or critical habitat, or will initiate formal consultation with the Service in accordance with Section V.B.6 of the National MOA.

In response to your question regarding the timeline for ESA consultation, if the USEPA continues with informal consultation and requests the Service's concurrence on USEPA's "not likely to adversely affect" determination, then the Service should respond to USEPA's request for concurrence, in writing, within 30 days. If the Service does not concur, the Service's response should include the species and/or habitat of concern, the perceived adverse effects, supporting information, and rationale. If the USEPA initiates formal consultation, applicable law requires that the Service issue a biological opinion within 135 days following initiation of formal consultation. In the National MOA, the Service agreed to strive to issue a biological opinion within 90 days of an initiation of formal consultation.

I hope that this addresses your concerns. If you have any additional questions or concerns, please contact Jenny Mann at (415) 972-3512 or mann.jenny@epa.gov.

Sincerely,

/s/ Terry V. Oda
Terry Oda Manager
CWA Standards &
Permits Office

Enclosure

[Image Omitted In Printing]
Debra Bills

07/09/2002 01:41 PM

To: Mima Falk/R2/FWS/DOI@FWS, Kim Hartwig/R2/FWS/DOI@FWS, Carrie Marr/R2/FWS/DOI@FWS
cc: Sherry Barrett/R2/FWS/DOI@FWS, Cindy Schulz/RO/R2/FWS/DOI@FWS
Subject: AZ NPDES

Please take a look at this draft initiation letter.

Since EPA has not bothered to separate the no effects from the may affects, I don't want to take the time to do that now either. Although less than ideal, we can decide later which species we will concur with. Granted the information on effects is sparse; we could argue that we don't have enough information to initiate, but I'm not sure what that would gain us.

What do you think about notifying tribes? Will they be interested? This consultation specifically excludes Indian lands, but it is a big change for the state.

Other comments welcome.

[File Image Omitted In Printing]
azpdesinitiate.wpd

Debra

AESO/SE
2-21-02-F-xxx

July 9, 2002

Mr. Terry Oda
Manager, CWA Standards & Permits
Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Mr. Oda:

This letter acknowledges the Fish and Wildlife Service's June 24, 2002, receipt of your June 21, 2002, letter requesting initiation of formal section 7 consultation under the Endangered Species Act, as amended. The consultation concerns the possible effects of the approval of Arizona's Pollution Discharge Elimination System program (AZPDES) for all of Arizona, except on Indian lands. Your letter concluded that the proposed action may affect but "is not likely to adversely affect" 60 listed species and critical habitat. Since you have requested formal consultation, we will proceed with formal consultation for those species or critical habitat where we do not concur with your "is not likely to adversely affect determination." A full explanation of our concurrence will be provided as an appendix to the biological opinion.

All other information required of you to initiate consultation w s either included with your memorandum or is otherwise accessible for our consideration and reference. Section 7 allows the Service up to 90 days to conclude formal consultation with your agency and an additional 45 days to prepare our biological opinion. Therefore, we expect to provide you with our biological opinion no later than November 3, 2002. We acknowledge your request for an expedited consultation. Although we

will attempt to meet this request, given the complexity of this project we can not guarantee an expedited consultation. We will, however, provide a copy of the draft biological opinion, as requested.

In keeping with our trust responsibilities to Native American Tribes, by this letter we will notify the Tribes which may be affected by this proposed action and encourage EPA to invite the Bureau of Indian Affairs to participate in the consultation process.

Also, as a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency make no irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If we can be of further assistance, please contact Carrie Marr (x 214) or Debra Bills (x 239).

Sincerely,

David L. Harlow
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ (Attn: M. Stegman)
John Kennedy, Arizona Game and Fish Department, Phoenix, AZ
Director, Navajo Fish and Wildlife Department, Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ

Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Tribe,
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ
Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

OFFICE OF THE
REGIONAL ADMINISTRATOR

Jul. 11, 2002

Ms. Jacqueline E. Schafer
Director, Arizona Department of Environmental Quality
1110 W. Washington
Phoenix, AZ 85007

RE: Completeness Determination for State of Arizona Submission for NPDES Program Approval

Dear Ms. Shafer:

I was pleased to receive the proposed Arizona Pollutant Discharge Elimination System (AZPDES) Program submitted by your staff on June 11, 2002, and the subsequent supplements on July 8 and July 10. I am aware of how hard both your staff and mine have worked on these documents. I look forward to working with you throughout the remaining approval process.

After review of the proposed AZPDES program, we have determined that the program submission is administratively complete for the purpose of 40 CFR 123.21. As required by 40 CFR 123.61, EPA will soon publish in the Federal Register a notice of the public hearing and comment period along with a summary of the State's proposed program. EPA will also send to area newspapers a public notice of the program, hearing, and comment period.

Again, let me congratulate you and everyone at the State on their fine effort. If my staff can assist you in any way, please feel free to call.

Sincerely,

/s/ [Illegible]
for Wayne Nastri 11 July 2002
Regional Administrator

Sherry Barrett

07/17/2002 10:33 AM

To: Scott Richardson/R2/FWS/DOI @FWS, Kim Hartwig/R2/FWS/ DOI@FWS, Mima Falk/R2/ FWS/DOI@FWS

cc:

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

fyi

— Forwarded by Sherry Barrett/R2/FWS/DOI on 7/17/2002 10:25 AM —

Susan MacMullin

07/16/2002 12:13 PM

[Image Omitted In Printing]

To: Sherry Barrett/R2/FWS/DOI@ FWS

cc: Dale Hall/RO/R2/FWS/DOI@ FWS, Geoff Haskett/RO/R2/ FWS/DOI@FWS, Steve Spangle /R2/FWS/DOI@FWS

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

Sherry, it is very possible that EPA has talked to them. I gave FWS WO a heads up because if Quarles knows, probably the Secretary's Corridor knows. We are going to meet next week (RO and FO) to discuss the consultation.

Sherry Barrett

Sherry Barrett

07/15/02 05:07 PM

To: Cindy Schulz/RO/R2/FWS/DOI @FWS, Susan MacMullin/RO/ R2/FWS/DOI@FWS

cc: Debra Bills/R2/FWS/DOI@ FWS, Mima Falk/R2/FWS/DOI @FWS, Steve Spangle/R2/FWS/

DOI@FWS, Kim Hartwig/R2/FWS/DOI@FWS

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

Susan: I have no idea of how Steve Quarles would know about our internal discussions regarding the level of effect for this consultation. It is possible that EPA has informed the development community. I share your sigh.

Sherry
Cindy Schulz

Cindy Schulz

07/15/2002 03:10 PM

[Image Omitted In Printing]

To: Mima Falk/R2/FWS/DOI@FWS, Sherry Barrett/R2/FWS/DOI@ FWS, Debra Bills/R2/FWS/ DOI@FWS

cc:

Subject: Re: Consultation with EPA R9 on transferring the NPDES program to Arizona

— Forwarded by Cindy Schulz/RO/R2/FWS/DOI on 07/15/2002 04:11 PM —

Susan MacMullin

07/15/2002 11:12 AM

[Image Omitted In Printing]

To: Geoff Haskett/RO/R2/FWS/DOI@FWS, Dale Hall/RO/R2/FWS/DOI@FWS

cc: Steve Chambers/RO/R2/FWS/DOI@FWS, Brian Hanson/R2/FWS/DOI@FWS, Steve Helfert/RO/R2/FWS/DOI@FWS, Cindy Schulz/RO/R2/FWS/DOI@FWS

Subject: Consultation with EPA R9 on transferring the NPDES program to Arizona

Geoff and Dale,

The filed office gave me a heads up that this is looking like a jeopardy. RO and FO are going to meet around the 22nd to go through what we have. Then we're going to talk to Terry Oda (Water Permits Chief in R9.) If we can turn this around, we will. We will set up a briefing with you shortly.

Greg Beatty To: Debra Bills/R2/FWS/DOI@FWS

07/24/2002 05:00 PM cc: Carrie Marr/R2/FWS/DOI@FWS

[Image Omitted In Printing] Subject: Re: npdes transfer

I think it could effect with respect to losing federal connections in housing developments Harvard (the Homestead in Camp Verde), Verde Valley Ranch (jeopardy), or possibly other ground water developments that could reduce aquifer amounts and/or stream flow as a result of housing developments or possibly other Clean Water Act actions. This could be incredibly significant. Consider that on the Verde River, most WIFLs are detected in Verde Valley on private land, on San Pedro River most WIFLs are on private land, on Gila River (upstream of San Carlos) in the Safford Area WIFLs are on private land. These are all growing areas. Think about, that not considering Roosevelt Lake, there are probably less than 10 pairs of WIFLs known on Forest Service lands in AZ, probably les than 50 pairs of BLM Land, and probably less than 40 pairs on FWS land. Much of the flycatcher is on private land, thus this could have a devastating effect.

Debra Bills

Debra Bills To: Greg Beatty/R2/FWS/DOI@FWS

07/24/2002 03:43 PM cc: Carrie Marr/R2/FWS/DOI@FWS

[Image Omitted In Printing] Subject: npdes transfer

Greg

Carrie and I need to talk to you about how the NPDES transfer from EPA to the state will effect flycatcher.

How will this loss of section 7 consultation effect the swwf?

Debra

[Informal undated memo concerning Southwestern willow flycatcher]

Seventeen occupied bald eagle breeding areas (18 total) of Arizona's 43 occupied sites in 2002 were on the Verde River. While other breeding areas exist in the state, many are not regularly productive due to a variety of anthropogenic factors. As a result, the Verde River is important to the survival of the eagle in Arizona due to its central location in the state and the amount of productive eagles. The 12 sites on the Verde River that produced young in 2002, produced 20 of the 36 fledglings in Arizona. Therefore, in 2002, the Verde River possessed 40 percent (17/43) of the state's occupied breeding areas and 56 percent (20/36) of the state's productivity.

Five eagle breeding areas (Tower, Perkinsville, Oak Creek, Camp Verde, and Ladders) exist in closest proximity (headwaters to Verde Valley) to the area of development pressure and water pumping.

The Verde River is contained within the Verde River Management Unit as a part of the recovery strategy in the draft Southwestern Willow Flycatcher Recovery Plan. To achieve recovery of the sub-species, there is a recovery goal of 50 pairs and other additional habitat measures to be met within this management unit. Four flycatcher sites have been discovered (Tuzigoot, Camp Verde, Ister Flat and Horseshoe Reservoir) along the Verde River, with the only occupied sites presently occurring at Camp Verde and in the conservation space of Horseshoe Reservoir. These two sites together possess less than 10 pairs of flycatchers. Critical habitat was designated for the flycatcher on the Verde River from SOB Canyon downstream to Horseshoe

Reservoir (now removed). This area encompasses the Verde Valley downstream to Horseshoe Reservoir.

The San Pedro River at its confluence with the Gila River (Winkelman site) is one the densest areas of nesting flycatchers (118 territories) in the state of Arizona and the entire range of this subspecies. Three breeding locations (San Pedro/Gila River confluence, Roosevelt Lake, Cliff/Gila Valley) throughout the subspecies range have contained nearly 50 percent of all known pairs (900). As of the end of the 2001 breeding season, the Winkelman site represented 34 percent of all flycatcher territories in Arizona. The importance of this site is emphasized because it is one of the few free-flowing rivers in Arizona, will be the largest site in Arizona when habitat at Roosevelt is inundated, supports flycatcher habitat along the Gila River, and is threatened by continued development and groundwater pumping from upstream users. Critical habitat was designated for the flycatcher on the upper and lower thirds of the San Pedro River (now removed).

In Arizona in 2001, 346 flycatcher territories were recorded throughout Arizona. The Roosevelt Lake (141 territories) and Winkelman (118 territories) totaled 75 percent of the states total (259/346). Following inundation and loss of habitat at Roosevelt, the Winkelman site will possess about 58 percent of all known birds in Arizona if the numbers stay similar. Flows on the San Pedro River not only support habitat along its banks, but also along the Gila River at their confluence. Management of Coolidge Dam upstream of the Gila./San Pedro confluence is not conducive to the development and maintenance of habitat without the sediment, natural hydrograph, and flows provided by the San Pedro River.

Two known consultations have occurred through EPA on housing developments on the Verde River. The Verde Valley Ranch, by Phelps Dodge resulted in a jeopardy opinion for flycatchers and was located at that time, next to the only two pairs of flycatchers known on the Verde River. The Homestead at Camp Verde, by Harvard Investments was also consulted upon for flycatchers by EPA. Extensive conservation measures developed by the applicant with the Service was able to avoid incidental take of flycatchers.

BRIEFING STATEMENT

PREPARED FOR: Region 2 Director

SUBMITTED: July 31, 2002 **STATE:** Arizona

TITLE: Arizona Pollutant Discharge Elimination System Program (AZPDES) Transfer from U.S. Environmental Protection Agency (EPA) Region 9

BACKGROUND/STATUS: The State of Arizona submitted an AZPDES application to EPA Region 9 in San Francisco on (*date?*). This program transfer would shift Clean Water Act responsibilities from the federal government to Arizona's Department of Environmental Quality. (ADEQ). The program transfer would include all point source discharges and construction stormwater permits in Arizona, excluding all Tribal lands. EPA received the application on June 11, 2002 and had 30 days to notify the State if the application package was complete. EPA sent AESFO a request for formal consultation June 21, 2002. They asked for completion of consultation by September 9, 2002, which is the EPA's 90 day deadline to approve or disapprove program transfer.

The proposed action is the delegation of the NPDES program to the State of Arizona. Additionally, the EPA will fund 40% of the AZPDES program for the next 3 years. We have informed them that we believe that they need to consult on both the delegation of the program and funding of the State's implementation of the program. EPA disagrees on the latter; apparently, EPA has never consulted on funding the program in other states.

The AZPDES Program will cover the following:

1. Issuance of individual permits for discharges from industrial, commercial, mining, and silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and domestic wastewater treatment facilities that include publicly owned treatment works and privately owned treatment works;

2. Issuance of general permits;

3. Administration of the NPDES pretreatment program;

4. Administration of all stormwater discharge programs, including municipal storm sewer systems (combined and separate), general permits for stormwater discharges, and individual permits for stormwater-only discharges; and

5. Administration of the NPDES permitting programs for Federal facilities.

The EPA's BE states that the program transfer is solely an administrative transfer of authority and, therefore, this action may affect, but is not likely to adversely affect all 60 listed species and their critical habitats in Arizona. As background for their effect determination, EPA cited in their BE the National MOA (among EPA, the Service, and the National Marine Fisheries Service), which established enhanced coordination between our agencies on the CWA. The MOA establishes a process for elevation of AZPDES permits for which AESFO may have concerns. However, EPA will only federalize a permit if the concerns pertain to water quality. They will not federalize permits where the action causing the stormwater discharge adversely affects an upland species. We also have concerns about decreases in water quantity resulting from such actions and whether

or not EPA will federalize a permit based on our objections because it is not strictly 'water quality'.

We anticipate that the proposed action in EPA's BE will appreciably reduce the conservation status of the endangered Pima pineapple cactus, the Huachuca water umbel, and cactus ferruginous pygmy-owl. Great strides in minimizing the disturbance of construction projects in the range of these species to provide for their survival and recovery will be diminished, if not lost. The EPA will not analyze indirect effects and cumulative effects for this action because it is only an 'administrative shift in authority'. Since the definition of indirect effects is that it is caused by the proposed action, later in time, and reasonably certain to occur, then this action is more than a shift in program authority: we will lose our section 7 nexus for consultation, and construction projects in Maricopa, Pima, Pinal, Yavapai, and Santa Cruz counties will destroy important habitat and adversely affect listed species. For example, construction projects in Pima County are often large housing developments, with > 1,000 homes, for which authorization under the construction general permit is required from EPA before the grading can begin. We also know of several large housing developments planned for Pinal, Pima, and Yavapai counties. Without our section 7 tools, development will go forward unchecked in the aforementioned counties. We also plan to consult formally on the southwestern willow flycatcher, the razorback sucker, the bald eagle, and the Gila topminnow. Specific information for the above-listed species follows.

Pima Pineapple Cactus (PPC) (*Coryphantha scheeri var. robustispina*)

- The species was listed in 1993. PPC is restricted to Pima and Santa Cruz counties in southeastern Arizona. PPC occurs at relatively low densities (0.04 to 0.5 cactus per acre) across the Altar and Santa Cruz valleys, up to elevations of 4,000 feet.

- To date, we know of approximately 3,680 cacti. Since the listing, approximately 1,750 cacti (48% of the total known) have been transplanted or removed from projects that underwent section 7 consultation. The amount of PPC habitat lost during that time is approximately 7,670 acres.

- PPC has a relatively low rate of transplant success, and the majority of cacti that have been moved are more than likely dead. If they are still alive, they can be considered ecologically dead because they have been removed from their habitat and no longer maintain their ecological connections to the landscape.

- A total of 2,423 acres of Pima pineapple cactus has been conserved in some manner. Of that amount, 1,146 acres (47%) were conserved through conservation measures gained through section 7 consultation with EPA, specifically on indirect effects from authorizing general construction storm water permits. All of this conservation has taken place since 2000.

- Approximately 45% of PPC occur on State lands; 5% on Federal lands; 30% on private lands; and 20% on Tribal and other ownerships.

- A HCP is being planned for the Altar Valley to address the effects of livestock grazing and fire management. PPC will be one of the species of

concern. The Arizona State Land Department is participating in the development of this HCP.

- Progress continues on the Sonoran Desert Conservation Plan, a regional planning effort that will result in a multi-species HCP. The cactus is currently one of the species being evaluated, but proposed conservation measures for any of the species have not yet been developed.

- There is one PPC conservation bank in place (640 acres) on land owned by Pima County. We are currently working with a private landowner in the Altar Valley for the establishment of a 1,300-acre PPC conservation bank.

- In order for these conservation banks to function as conservation tools, there must be an economic incentive for landowners to participate. If section 7 consultations diminish, then there will be no "business" to send to the conservation banks.

- No projects have been stopped due to section 7 consultation.

- There have been a total of 17 formal consultations since listing; five of them have been with EPA, all occurred after 2000.

- Through review of proposed developments in Pima County for the years 2001-2002, there are 12 projects that would require section 7 consultation with EPA on their issuance of a storm water construction general permit. These are all projects that are close to known locations of Pima pineapple cactus and support suitable habitat. These projects total approximately 3,527 acres.

- With no conservation measures in place with EPA and the State of Arizona, all of this habitat and the Pima pineapple cactus on these sites would be lost.

- The majority of occupied and suitable habitat for this species occurs on State trust lands. The majority of these lands are zoned for development. PPC habitat will continue to be developed and fragmented, and the species will be at risk of severe decline.

Huachuca Water Umbel (HWU) (*Lilaeopsis schaffneriana var. recurva*)

- HWU was listed in 1997. Critical habitat was designated in 1999.
- The largest unit of critical habitat is a 33.7-mile reach of the San Pedro River, located in Cochise County, Arizona. This portion of the river supports 43 sub-populations of HWU.
- HWU is dependent on perennial water. The plant requires low flow, low velocity, pools and backwaters that undergo periodic flooding to reduce competition and shading from larger perennial plants. HWU needs saturated soil and is dependent on steady water levels for habitat stability.
- The city of Sierra Vista is experiencing tremendous growth. Housing and commercial developments use water that is pumped from the San Pedro River.
- Section 7 consultations with EPA have allowed for the development of conservation measures that minimize the impact of water withdrawals from the San Pedro. Without a federal nexus, the cumulative effects associated with continued development could compromise the water quantity in critical habitat, reducing the likelihood of the long-term survival and recovery of HWU.

Cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*)

- The pygmy-owl was listed in 1997. Its historical range included much of southern Arizona; current known locations are in Pima and Pinal counties.
- The pygmy-owl is found in a variety of vegetation communities below 4,000 feet elevation.
- To date, AGFD has documented 18 pygmy-owls in Arizona. Additional pygmy-owls likely occur on the Tohono O'odham Nation. Surveys are on-going to determine pygmy-owl populations in Mexico. There are currently only 2 pygmy-owls known to occur on Federal lands (Organ Pipe Cactus National Monument).
- Conservation of the species cannot rely on speculative populations that occur on the Tohono O'odham Nation. Conversations with Tribal biologists verify that this population is experiencing the same environmental stresses created by the on-going drought, as are other known populations in the state.
- Prior to listing of the pygmy-owl and section 7 consultations, most construction in pygmy-owl habitat was high-density with no conservation. Pygmy-owls do not utilize areas of high-density development; in addition to the loss of habitat, the resulting habitat fragmentation affects dispersal, courtship and pair bonding. Currently, areas without a federal nexus continue to be constructed through mass grading. We know of at least 7 projects with a federal nexus that occurred in suitable habitat without consultation; these projects affected approximately 600 acres of habitat.
- Through the section 7 consultation process, we work with developers to reduce development impacts to 20-25%

disturbance in breeding areas, and maintain dispersal and movement corridors to reduce the likelihood of genetically isolated populations. We have conducted 12 formal section 7 consultations on development projects; in addition, there have several consultation on other actions such as grazing, road improvements, etc.

- We are in informal consultation for 16 residential and commercial development projects throughout Maricopa, Pinal and Pima counties solely because of the EPA federal nexus; these projects consist of approximately 30,000 acres.

- Conserving the northwest Tucson meta-population is essential to the survival of the species; this population consistently has the highest productivity of young produced each year and contains 7 of the 18 known pygmy-owls in the state, or approximately 40% of the population.

- It is highly likely that we will lose our ability to ensure ANY level of pygmy-owl protection without the EPA federal nexus as demonstrated with the remand of critical habitat (at which point the COE withdrew projects from consultation).

- Without section 7 consultation, the only other option is to pursue incidental take violations through section 9; to date, law enforcement is unwilling to pursue such cases even when housing developments, schools and commercial projects are constructed within breeding territories.

- Pursuing future HCP's with private developers is strictly a voluntary process; without the probability of 'take' liability, landowners see no benefit in pursuing the HCP's. We have completed one HCP in northwest Tucson and are working with another private developer to complete their HCP; and we are working

with Pima County; the Town of Marana, and the Altar Valley Alliance to develop regional HCP's; the latter two are pursuing section 6 grants for funding their planning processes. All are in the planning phases.

- We have approached four developers with projects occurring within or adjacent to pygmy-owl territories; they declined our recommendation to develop HCPs, and several of those areas are now mass graded.
- Other conservation tools we are using to conserve the pygmy-owl include: section 6 Recovery Acquisition Grants and conservation banks.
- Safe Harbors are not an option for lands undergoing residential development, as construction activities take the species below baseline conditions. Safe Harbors work better in rural areas where landowners desire to enhance the condition of their properties for species.
- The Recovery Team is evaluating augmentation of pygmy-owl subpopulations through a captive breeding program or through translocation of birds. Maintaining suitable habitat, especially in the northern range of the species, is required for augmentation. Maintaining suitable habitat is occurring through section 7 consultations with EPA.
- Other species that may be adversely affected by water quantity issues associated with stormwater discharge permits are the southwestern willow flycatcher, Gila topminnow, and razorback sucker in the Verde River and Santa Cruz River watersheds.

Recommended Alternatives

1. EPA retains administration of individual permits under the stormwater discharge program. If projects adversely affect a listed species or critical habitat, the

applicant would not be authorized under the construction general permit, but would be required to obtain an individual permit. EPA would retain jurisdiction over the individual permit and would continue to consult with us on the adverse effects. This portion of the program could be delegated to the State in the future if they developed an adequate conservation and review program. This avenue would not require special conditions on the permit.

2. Since EPA has committed to funding ADEQ for the next three years, a Federal nexus will be retained for this time period, which would allow us time to work on alternatives 3 and 4.

3. We develop a MOU with the State (ADEQ and Arizona State Lands Department) to maintain the current level of review and conservation. Within this framework, the State would establish their own conservation programs to conserve priority areas for listed species.

4. We develop a HCP with the State to establish endangered species review of proposed projects and conservation measures to minimize and mitigate adverse effects to listed species.

SERVICE/DEPARTMENT ACTION TAKEN: We have prepared a letter to EPA requesting more information before we initiate formal consultation. We need more information regarding the history of permits that EPA has approved in certain geographical areas of Arizona in the last 3 to 5 years. We need to establish in the administrative record that the EPA did not analyze: adverse effects thoroughly and because of this, we will have to spend time doing their work for them.

POSITION OF INTERESTED PARTIES: Mining companies and developers across the state, including those in Pima County, are interested in this program transfer before a new governor is chosen in November.

DEPARTMENT/BUREAU PERSPECTIVE: Loss of section 7 consultation for the PPC, pygmy-owl, and HWU will result in significant effects to their survival and recovery through destruction, degradation, and fragmentation of their habitats.

FOR INFORMATION CONTACT: AESFO – Phoenix, 602-242-0210; Carrie Marr (x214), Debra Bills (x239), or Sherry Barrett (520-670-4617).

[SEAL] **United States Department of the Interior** [LOGO]
U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210
Fax: (602) 242-2513

In Reply Refer to:

AESO/SE 2-21-02-F-268

August 20, 2002

Mr. Terry Oda Manager
Clean Water Act Standards & Permits
Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Mr. Oda:

This letter acknowledges the Fish and Wildlife Service's receipt of your June 21, 2002, letter requesting initiation of formal section 7 consultation under the Endangered Species Act, as amended. We received your request on June 24, 2002. The consultation is regarding the effects of the approval of Arizona's Pollution Discharge Elimination System (AZPDES) program for all of Arizona, except on Indian lands, on federally proposed and listed species and proposed and designated critical habitat. The U.S. Environmental Protection Agency (EPA) concluded that the proposed action may affect but is not likely to adversely affect all listed species and critical habitat in Arizona, but also requested initiation of formal consultation for the action described in the Biological Evaluation (BE) and our preparation of a biological opinion.

We will initiate formal consultation on the AZPDES program as soon as we receive the information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14). To complete the initiation package, please provide the following information:

1. A description of how the section 7 consultation process will continue to be implemented following delegation of the program to the State of Arizona.

2. A description of the specific area that may be affected by the action.

The June 21, 2002, BE gave no indication of the areas that may be affected by the action. Please define where listed species and their critical habitat may be affected by the action. Please include a list of all NPDES permits previously authorized in Arizona and the location covered in each permit.

3. A description of the manner in which the action may affect any listed species or critical habitat, and an analysis of any cumulative effects.

Provide a description of the manner in which the EPA will ensure that the analysis of indirect effects associated with the issuance of permits will continue. Please provide a description of how the analysis will be completed.

Upon receipt of these items, formal consultation will be initiated. The regulations governing section 7 consultation allow 90 days for formal consultation plus an additional 45 days to deliver the biological opinion. This 135 day time frame does not begin until we have received all information required to initiate formal consultation

as described in 50 CFR 402.14(c). Therefore, we ask that you request an extension from your September 9, 2002 deadline with the State of Arizona.

We look forward to working with you and State of Arizona on resolution of these issues. If we can be of further assistance, please contact Carrie Marr (x214) or Debra Bills (x239) at (602) 242-0210.

/s/ Brian Hanson

Brian Hanson
Acting Field Supervisor

cc: Regional Director, Fish and Wildlife Services
Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ
(Attn: M. Stegman)
Assistant Field Supervisor, Tucson Suboffice,
Tucson, AZ
John Kennedy, Arizona Game and Fish Department,
Phoenix, AZ
Director, Arizona Game and Fish Department,
Phoenix, Arizona
Regional Supervisor, Arizona Game and Fish
Department, Tucson, AZ
Director, Navajo Fish and Wildlife Department,
Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ
Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Nation, Camp Verde, AZ
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ

Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

W:\Carrie Marr\az npdes bo\azpdesletter.wpd.cgg

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

AUG 22 2002

Mr. Brian Hanson
Acting Field Supervisor
U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

In reply, refer to WTR-5

Dear Mr. Hanson,

On June 21, 2002, the U.S. Environmental Protection Agency (USEPA) sent the U.S. Fish and Wildlife Service (FWS) a biological evaluation (BE) and requested the initiation of section 7 formal consultation under the Endangered Species Act (ESA) on the USEPA's proposed approval of the State of Arizona's Pollutant Discharge Elimination System program (AZPDES program). I am writing in response to your letter dated August 20, 2002, in which you requested "information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14)."

In the August 20, 2002 letter, FWS requested:

> 1. A description of how the section 7 consultation process will continue to be implemented following delegation of the program to the State of Arizona.
>
> *USEPA Response:* It is unclear to the USEPA what FWS would like the USEPA to describe in response to this request. As you know and as discussed in the BE, the USEPA and the FWS have signed a Memorandum

of Agreement describing the manner in which the USEPA and the Services will work together to ensure that States administering the NPDES program protect federally listed endangered and threatened species. *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* dated February 22, 2001 (National MOA). Those procedures are designed to facilitate input by the Service into the State permit-issuing process and, if necessary, commit the USEPA to exercise its oversight authority over State NPDES permits to protect species. Those procedures contemplate close cooperation, but not section 7 consultation, on State-issued permits in light of the fact that a State NPDES permit is not a federal action, but an action of the State undertaken wholly under State law. As we indicated in our BE (see parts VI and VII of the BE), the USEPA is committed to following the procedures in our MOA to continue to ensure the protection of listed species after our approval of the State program. Section 7 would apply, however, if a project requiring a State-issued NPDES permit were to involve a Federal action, such as a Clean Water Act section 404 permit from the U.S. Army Corps of Engineers, that may affect listed species or critical habitat or if EPA were to object to a State NPDES permit and ultimately issue a federal NPDES permit for a discharge because the State failed to satisfy EPA's objection. And, of course, sections 9 and 10 of the ESA will continue to apply to the State and any entities that may receive NPDES permits in the State of Arizona.

2. The June 21, 2002, BE gave no indication of the areas that may be affected by the action. Please define where listed species and their critical habitat

may be affected by the action. Please include a list of all NPDES permits previously authorized in Arizona and the location covered in each permit.

USEPA Response: Part VII of the June 21, 2002 BE states, "As the location of future discharges cannot be anticipated, for purposes of this BE, the USEPA has determined that all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters may be affected by this action." As it is impossible to predict the location of future discharges, the USEPA believes that all areas containing listed species or critical habitat in, adjacent to, or dependent on surface waters maybe affected by the action. A list of such species was provided in Appendix C to the BE.

The appendix to this letter lists all NPDES permits authorized in the state of Arizona (excluding NPDES permits in Indian Country), and, for each such permit, the facility address and the name of the receiving water if available. The USEPA has previously provided FWS with documents containing this information.

3. Provide a description of the manner in which the EPA will ensure that the analysis of indirect effects associated with the issuance of permits will continue. Please provide a description of how the analysis will be completed.

USEPA Response: As described in detail in our BE (see Part V.B. of the BE), we will address any endangered species-related concerns regarding State-issued NPDES permits through the coordination process outlined in the National MOA.

The USEPA believes that the information requested in your letter, with the exception of a list of all NPDES

permits in Arizona, was provided in the June 21, 2002 BE. Therefore, we request that FWS consider the June 21, 2002 submission of the final BE as the initiation of formal consultation. Regardless, we are under a statutory deadline to approve or disapprove the Arizona program submission and would appreciate your cooperation in helping us to conclude this consultation in a timely manner so that we may meet our statutory deadline, as agreed by our respective agencies in section V.B.6 of the National MOA.

We look forward to continuing to work with you on this consultation, and we are prepared to assist you in expediting the process. If you have further questions, please contact Jenny Mann at (415) 972-3512 or mann.jenny@epa.gov.

Sincerely,

/s/ Terry Oda

Terry Oda, Manager
Clean Water Act Standards
and Permits Office

enclosure:

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ (Attn: M. Stegman)
Assistant Field Supervisor, Tuscon Suboffice, Tucson, AZ
John Kennedy, Arizona Game and Fish Department, Phoenix, AZ
Director, Arizona Game and Fish Department, Phoenix, Arizona
Regional Supervisor, Arizona Game and Fish Department, Tucson, AZ

Director, Navajo Fish and Wildlife Department, Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ
Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Nation, Camp Verde, AZ
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ
Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

ARIZONA ASSOCIATION INDUSTRIES [Image Omitted In Printing]

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September 6, 2002

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: ***Arizona Association of industries Comments in Support of ADEQ Administration of NPDES Program (67 Fed. Reg. 49,916 through 49,920 (August 1, 2002))***

Dear Mr. Mitchell:

The Arizona Association of Industries' Environment, Health and Safety Committee ("AAI") wishes to express its strong support for the United States Environmental Protection Agency ("EPA") timely approval of the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollutant Discharge Elimination System ("NPDES") program in Arizona (*see* 67 Fed. Reg. 49,916-20 (Aug. 1, 2002)). AAI believes that state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will result in increased understanding and responsiveness to local conditions, more timely resolution of permitting and other important issues, improved communication, greater efficiency, and enhanced environmental protection. Arizona clearly has satisfied the regulatory requirements for state program approval as set forth in 40 C.F.R. Part 123. Accordingly, EPA should approve the submitted program within the

90-day statutory review period. There is no reasonable legal or practical basis for any further delay.

AAI also has reviewed the comments to be submitted on ADEQ's NPDES application by the Greater Phoenix Chamber of Commerce and the Arizona Chamber of Commerce. AAI supports and endorses these comments and therefore incorporates the Chamber comments by reference. Thank you for the opportunity to provide comments on this important matter to the long-term benefit of the State of Arizona.

Sincerely,

Jeffrey Horner
Jeff Horner
Chairman, Environmental, Health & Safety Committee

cc: Mr. Chris Varga, Federal Permit Unit,
Arizona Department of Environmental Quality

DIAMOND VENTURES INC.

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E-MAIL: diamondventures@theriver.com

September 9, 2002

Mr. Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region IX
Water Division
75 Hawthorne Street
San Francisco, California 94105

Re: Support for ADEQ Administration of NPDES Program (67 Federal Register 49916-20, dated August 1, 2002)

Dear Mr. Mitchell:

Our firm is an Arizona based, regional real estate development company that is frequently involved with land development projects in various locations around the State of Arizona and other states in the southwestern United States. We, therefore, are very familiar with the requisite federal, state and local permitting procedures associated with the activities of our firm.

Diamond Ventures, Inc. respectfully requests that the United States Environmental Protection Agency ("EPA") approve the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollution Discharge Permit System ("NPDES") program, as referenced above. Support for this application comes from a wide range of "stakeholders" and a vast majority of the regulated community. The application is fully supported by the State of Arizona with approval (by

2/3rds margin) by both houses of the Arizona Legislature. The Arizona Governor's Office and Arizona Legislature placed the highest priority upon this application and resulting program by establishing a full funding commitment to ADEQ for the administration of this program, even though these are lean years for state government.

Our firm believes that the adoption of the program is good for the State of Arizona and strongly supports the transition of permitting responsibility from EPA Region IX to ADEQ. The following reasons support this conclusion:

1.) **Local Control and Understanding of Local Conditions:** A state agency is better prepared to understand and respond to local conditions in a manner that will result in improved environmental quality for future generations. The administration of NPDES program by the individual states has been embraced by the U.S. Congress, through the Clean Water Act, and implemented in 44 states.

2.) **Improved Communications:** Improved environmental protection is dependent upon the quality of communication between the regulatory agency and regulated community. ADEQ maintains offices in Phoenix, Tucson and Flagstaff and is therefore in an advantageous position to maintain the highest quality and direct communication with the regulated community.

3.) **ADEQ Qualifications:** ADEQ has demonstrated that it is fully capable of administering complex environmental programs. With committed resources, as

mentioned above, the agency has extensive permitting and enforcement experience under the current NPDES and Aquifer Protection Permit programs. Contrary to certain criticisms leveled at ADEQ relative to the proposed application, ADEQ is fully capable to administer the Arizona Pollution Discharge Permit ("AZDES") program.

4.) **Endangered Species and Historic Properties:** The U.S. Congress has expressed a strong preference to have states take the lead role in the protection of waters within their boundaries so long as sufficient program support is generated within states and so long as the statutory elements of the Clean Water Act are satisfied. The AZDES program has been designed consistent with the programs in place in 44 other states relative to the Endangered Species Act and Section 7 consultations with the U.S. Fish and Wildlife Service. Like other states that administer pollution discharge permits, procedures have been built into the AZDES program to provide the appropriate and legally mandated oversight of the program by EPA and U.S. Fish and Wildlife. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a permit under the AZDES program is not unusual and is, in fact, typical.

The protection of historic properties is not a significant concern of the approval of the AZDES program in that, like under the Endangered Species Act, ADEQ is not required to consult with the State Historic Preservation Office ("SHPO") (in accordance with Section 106 of the National Historic

> Preservation Act.) In the same manner as stated above, the AZDES program is designed consistent with the programs in place in the vast majority of states relative to the National Historic Preservation Act.

In closing, we urge you to approve the ADEQ application to administer the NPDES program. We are confident that such action will result in enhanced environmental protection within the State of Arizona and improved environmental quality for future generations of Arizona residents.

Sincerely,

/s/ K. Abrahams

Kenneth D. Abrahams Vice President

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September 13, 2002

Via Federal Express

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: Comments in Support for Administration of the NPDES Program by the Arizona Department of Environmental Quality 67 Fed. Reg. 49916-20 (Aug. 1, 2002)

Dear Mr. Mitchell:

On behalf of the Southern Arizona Home Builders Association ("Association"), we appreciate the opportunity to submit the following comments in support of the Arizona Department of Environmental Quality ("ADEQ") application to administer the National Pollutant Discharge Elimination System ("NPDES") program. *See* 67 Fed. Reg. 49916 (Aug. 1, 2002). The Association has over 700 members and represents builders, developers, contractors, and others engaged in the development and construction of single-family homes and apartments. The Association has a substantial interest in administration of the NPDES program because

our members are generally required to obtain storm water permit coverage for construction activities and to comply with storm water pollution prevention planning requirements. The following discussion provides the basis for the Association's support of the Arizona Pollutant Discharge Elimination System.

I. Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices in Phoenix, Flagstaff and Tucson, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco, notwithstanding the best efforts

of EPA to do so with more limited local resources. The opportunities for face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

- *Increased understanding of local conditions.* A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(E).

- *More Efficiency.* We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based

and standards-based permitting requirements). Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[1] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

- *Enhanced environmental protection.* The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

[1] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program Well.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

- *The State of Arizona has shown a solid commitment to the AZPDES program.* The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future, the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

- *ADEQ is fully capable of administering this program well.* In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

III. The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ,

as a state agency, will not be required to formally consult with USFWS when it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

- *AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits.* Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R. § 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) &

R18-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act. See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

- *Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants.* Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges

permitted by ADEQ will not adversely affect listed species.

- *Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved.* The extent of federal control and involvement in this state is pervasive. The federal government owns almost 70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

- *Private action outside of Section 7 that results in a "taking" (i.e., killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS.* This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address

adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be required to consult with SHPO. However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G) & (H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of this proceeding. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

IV. Conclusion and Request for Approval of ADEQ's Application.

ADEQ administration of the NPDES program will result in significant benefits to our state, including protection of water quality. There is strong support from state government to administer this program. Concerns regarding the implications of EPA approval of the AZPDES program on endangered species and historic properties have been exaggerated. These issues can and should be resolved through USFWS and SHPO cooperation with ADEQ. We therefore respectfully request that EPA approve ADEQ's application to administer the NPDES program.

We appreciate your consideration of these comments. If you have any questions or concerns regarding these comments, please contact the Association at your convenience at (520) 795-5114.

Sincerely,

/s/ Robert Anderson
Robert D. Anderson

cc: Mr. Chris Varga, Federal Permit Unit, AZ Dept of Environmental Quality
Alan Lurie, Southern Arizona Home Builders Association

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

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September 13, 2002

Matthew Mitchell
Water Division, WTR-5 EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

Re: Arizona's NPDES primacy application

Dear Mr. Mitchell:

The Arizona Center for Law in the Public Interest, Defenders of Wildlife, the Center for Biological Diversity, and the Sierra Club have the following comments on the State of Arizona's application to administer the national pollutant discharge elimination system ("NPDES") program in Arizona (referred to hereafter as "AZPDES program") as noticed and described in 67 Fed. Reg. 49916 (August 1, 2002). Unless and until the deficiencies described below are remedied, EPA lacks the authority to approve the AZPDES program.

I. EPA Must Comply Fully With The Endangered Species Act.

A. EPA Must Complete Formal Section 7 Consultation Prior To Any Decision Approving AZPDES Program.

Every federal agency must, "in consultation with and with the assistance of the [U.S. Fish and Wildlife Service],

insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . " Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). In furtherance of these obligations, each federal agency is required to complete formal section 7 consultation with the U.S. Fish and Wildlife Service ("FWS") whenever an agency undertakes an action that "may affect listed species or critical habitat," unless the FWS determines "that the proposed action is not likely to adversely affect any listed species or critical habitat" 50 C.F.R. § 402.14(a)-(b). "Effects" of an action include " . . . the direct and indirect effects of the action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action . . . " 50 C.F.R. § 402.02. Furthermore, once the section 7 consultation has been initiated, the consulting federal agency is prohibited from making any "irreversible or irretrievable commitment of resources with respect to the agency action . . . " 16 U.S.C. § 1536(d).

There is no doubt that EPA's consideration and approval of the AZPDES program is an action mandating formal consultation under section 7 of the ESA. Indeed. EPA has acknowledged that approval of the AZPDES program may affect numerous federally-listed species and designated critical habitats in Arizona and therefore, EPA requested initiation of formal consultation with FWS. [See Letter from Terry Oda to David Harlow dated June 21, 2002 (hereafter referred to as "June 21st Letter."] However, formal section 7 consultation must be *completed* prior to any decision by EPA regarding the AZPDES program.

B. EPA Has Failed [sic] Initiate Formal Section 7 Consultation.

Notwithstanding EPA's acknowledgment that it has a duty to formally consult with FWS regarding the AZPDES program, EPA has not yet properly initiated formal section 7 consultation. On August 20, 2002, FWS properly rejected EPA's request to initiate formal consultation based on EPA's failure to provide FWS with the basic information necessary, and required by law, for preparation of a Biological Opinion ("BO"). [See Letter from Brian Hanson to Terry Oda dated August 20, 2002 (hereafter referred to as "August 20th Letter".] The ESA and its implementing regulations require that written requests to initiate formal consultation must include, among other information, a "description of the specific area that may be affected by the action," and a "description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects." 50 CFR 402.14(c)(2,4). As noted in the August 20th Letter, EPA failed to meet these minimum requirements. [See August 20th Letter stating, "We will initiate formal consultation on the AZPDES program as soon as we receive the information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14)."] Indeed, EPA's Biological Evaluation for Endangered Species Act Consultation on USEPA's Proposed Approval of the State of Arizona's NPDES Program, dated June 21, 2002, (hereafter referred to as "EPA's BE") is woefully deficient in several respects.

For example, EPA's BE fails to adequately assess the manner in which approval of the AZPDES program may affect listed species or critical habitat in Arizona. EPA asserts that "[i]n changing from a Federal permitting

program to a State permitting program, the permit-related ESA Section 7 process for consultation *will no longer apply.*" [EPA's BE at 15 (emphasis added).] The procedural and substantive requirements of section 7 of the ESA are among the most fundamental and important protections afforded to listed species and critical habitat under the ESA. There is no question that NPDES permitting decisions have in the past and will, in the future, result in substantial negative impacts to listed species and critical habitat. Terminating section 7 consultations on NPDES permitting actions in Arizona will have monumental impacts on listed species and critical habitat. Yet, EPA's BE fails to analyze these likely impacts whatsoever. Indeed, EPA's BE fails to analyze the impacts of this action for even one of the 60 federally-listed species that EPA identified as likely to be affected: Instead, EPA simply concludes that "any potential adverse effects to Federally-listed species or critical habitat" resulting from transfer of NPDES permitting authority to Arizona "would be insignificant and/or discountable." EPA's BE at 16. This conclusion is not only legally defective on its face – there is no "insignificant and/or discountable" exception for adverse effects under the ESA – but is completely unsupported by any meaningful analysis.

EPA's BE is also legally deficient because it fails to undertake any analysis of cumulative effects as required by the ESA. ESA implementing regulations define "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. If the AZPDES program is approved by EPA, there is an absolute certainty that in the future, hundreds of state

NPDES permits will be issued annually with the potential of causing substantial negative impacts to listed species and critical habitat. Yet, EPA's BE contains no discussion, let alone analysis, of even basic information essential to accurately assess these cumulative effects including, for example, how many NPDES permits are likely to be issued by the State of Arizona on an annual basis, what specific species and critical habitats are likely to be impacted by such permits, and how the specific species or critical habitat may be affected.

C. EPA's Approval Of The AZPDES Program Will Jeopardize The Continued Existence Of Dozens Of Federally-Listed Species And Result In The Destruction Or Adverse Modification Of Critical Habitat.

EPA's approval of the AZPDES program is no small procedural matter for the approximately sixty endangered and threatened species in Arizona. As already noted, it is EPA's position that transferring the NPDES program to the State of Arizona will terminate application of the requirements of section 7 of the ESA with respect to NPDES permitting, thus eliminating one of the most important legal protections for these species and their habitats. Nonetheless, EPA asserts that such action will have at most "insignificant and/or discountable" impacts on listed species and critical habitat. One need look no further than the substantial impacts that have and continue to occur to listed species and critical habitat in Arizona from *EPA-issued* NPDES permits, where the requirements of section 7 of the ESA are in effect, to understand that EPA's claim is simply incorrect.

Stormwater discharge and point source discharge permits for residential and commercial urban development projects often result in significant adverse impacts to listed species and critical habitat. Obvious adverse effects of such NPDES permitting include the elimination of listed species, destruction of occupied and unoccupied habitat, and adverse modification of designated critical habitat. These effects are often significantly multiplied when considered alongside impacts resulting from Clean Water Act section 404 permits. Other NPDES permit impacts include increased domestic water consumption, degradation of watershed and water quality conditions, and resulting harm to riparian or aquatic listed species and designated critical habitat, often many miles away from the permitted development.

The cactus ferruginous-pygmy owl ("pygmy owl") is one of dozens of species in Arizona impacted by projects and activities authorized by EPA's NPDES program. The pygmy owl is threatened primarily by past and ongoing destruction and fragmentation of habitat, particularly within the Tucson Basin, from urban and commercial development, much of which is authorized by NPDES permits. The harmful effects of NPDES permitting is also apparent in the San Pedro River basin where increased pollution is threatening the species that depend on that water-based ecosystem for survival. The FWS has detailed a number of concerns with regard to NPDES permitting in and around the San Pedro River basin including the impacts of the effects of consumptive water use from urban development. [See Letter to Alexis Strauss from U.S. FWS dated April 27, 2000 (hereafter referred to as "April 27th Letter").] According to the FWS, annual groundwater withdrawals exceed replacement in the

Sierra Vista subwatershed by roughly 7,000 acre-feet, and are ultimately expected to diminish or eliminate baseflow in the river. Listed species such as the southwestern willow flycatcher, Huachuca water umbel, spikedace and loach minnow, and their critical habitats, will all be affected by any such baseflow reduction. Groundwater pumping for new urban development is clearly an indirect effect of NPDES permitting in this region.

FWS has also detailed a number of harmful indirect effects of urban development in the Verde River basin of central Arizona. For example, in its December 26, 2001 Biological Opinion on the NPDES permit for the "Homestead at Camp Verde," a development project the FWS found that:

> Urbanization near the Verde River has reduced the ability to establish dense riparian vegetation. Development has created and maintained the demand for domestic and industrial water use resulting in increased groundwater pumping and flood control structures that alter stream hydrology and also increases bridges, roads, vehicles, sand and gravel mining and other industrial and commercial uses detrimental to riparian habitat. Urbanization has also increased the demand for recreational use of remaining riparian areas for trails, campgrounds and use of river areas for off-road vehicles, etc. Developments and recreation increase trash, lawns, bird feeders, and habitat fragmentation, and as a result, an increase of predators or passerines such as cowbirds house cats, grackles, and ravens . . .

[Biological Opinion, Homestead at Camp Verde NPDES Permit, December 26, 2001.] Overuse of groundwater in

the Verde River basin is also a major concern. According to FWS, "the extent of groundwater overdraft (water resources that are not being replenished) in [Chino and Verde valleys] ... was considered critical ... " *Id.* [Furthermore, urbanization also results in watershed degradation, including increased runoff, erosion, altered hydrogeomorphology, incision, lowered water table, and resulting losses of riparian vegetation. These indirect effects of NPDES permitting adversely affect Verde River basin riparian and aquatic habitats, and dependent federally listed species, including the Bald eagle, Southwestern willow flycatcher, loach minnow, spikedace, razorback sucker and their designated critical habitats.

The examples above are merely a sampling of the negative impacts that are likely to result from EPA approval of the AZPDES program. At present, these impacts must, at least, be examined through the ESA's section 7 consultation process. Once the program is transferred to the State, it is apparently EPA's position that section 7 consultation will rarely, if ever, occur, thereby substantially increasing the likely impacts of AZPDES permits on listed species and critical habitat. Notwithstanding EPA's claims to the contrary, neither the provisions of the Clean Water Act, Arizona's water quality standards, or EPA's proposed oversight of the AZPDES program are adequate substitutes for section 7 consultation under the ESA. In short, without a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program.

II. The AZPDES Appeals Process Is Not Consistent With Federal Requirements.

EPA may only approve a state's NPDES permit program that is consistent with and not less-stringent than the federal NPDES permit program. 40 C.F.R. § 123.1. Although states are free to enact provisions that are more stringent than the federal requirements, the states must meet the minimum federal requirements. Federal law requires that states administering NPDES programs shall provide for public participation in the state enforcement process by providing either of the following:

> (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest **which is or may be adversely affected**; or
>
> (2) Assurance that the state agency or enforcement authority will:
>
> (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26 (b)(4);
>
> (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
>
> (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a state enforcement action.

40 C.F.R. § 123.27 (d) (emphasis added). Furthermore, the judicial review available under a state's NPDES program must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain

judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30. There can be no serious dispute that the language in 49-323 (A) fails to comply with federal law.

A.R.S. § 49-323 (A) provides, in pertinent part, that an appeal may be taken "by any person who is adversely affected by the action or by any person who may with reasonable probability be adversely affected by the action and who has exercised any right to comment on the action . . . " This provision is far more restrictive than the federal standard and clearly violates the requirements of 40 C.F.R. §123.30. This "procedure" will have a chilling effect on public participation in all aspects of the permitting process but especially the judicial review because it severely limits the right to judicial review of a permitting decision. Again, the Arizona Center for Law in the Public Interest and the Sierra Club, among others, have been raising this issue for over a year. We raised it with the Arizona Legislature, the Governor, and the Arizona Department of Environmental Quality. At this point it is evident that unless the State of Arizona is ordered to make the necessary changes by either EPA or a court, the State will maintain the status quo of denying citizens their federally established right to judicial review of permit decisions.

III. The State Of Arizona Cannot Adequately Fund The AZPDES Program.

Pursuant to the Clean Water Act, the state seeking delegation must have adequate authority to administer

the NPDES program. 33 U.S.C. § 1342(6). In the present case, Arizona lacks the authority because the program has no funding mechanism whatsoever. It is our understanding that EPA is providing the majority of the funding for the AZPDES program. Without EPA funding, it is apparent that the State would be unable to support the AZPDES program thereby forcing EPA to withdraw delegation. In addition to the State's ongoing budget crisis, the State has assured that the AZPDES program would not be self-supporting by prohibiting itself from instituting any type of permit fee. A.R.S. § 49-255.01 (J) states that " . . . The Department shall not charge a fee to issue, deny, modify. suspend or revoke a permit under this Article or to process permit applications." Permit fees are a widely-used for obtaining additional funding for such programs on both state and federal levels. *See e.g.,* Cal. Water Code § 13260 (establishing annual fees). It is our understanding that the State made the decision to not implement permit fees in order to gain support for the primacy process from the regulated community. However, this compromise will likely cost Arizona the NPDES program because after EPA funds are terminated, Arizona will most likely be unable to fund the program as it is currently defined.

IV. International Wastewater Treatment Plants Must Remain Under EPA's Authority.

EPA should retain authority for regulating all NPDES permits for international wastewater treatment plants, and specifically, the Nogales International Wastewater Treatment Plant. EPA is an important part of the process towards repairing the Nogales Plant and it is imperative that EPA remain the regulator of that facility.

Thank you for the opportunity to submit comments on the AZPDES program. If you have any questions regarding this letter, please contact Vera Komylak at 520-529-1798 or Michael Senatore with Defenders of Wildlife at 202-682-9400 ext. 123.

Sincerely,

/s/ [Illegible]

Vera S. Komylak
Staff Attorney
Arizona Center for Law
in the Public Interest
on behalf of,

Michael P. Senatore,
Litigation Director
Defenders of Wildlife

David Hogan,
Urban Wildlands and
Rivers Program Coordinator
Center for Biological Diversity

Sandra Bahr,
Conservation Outreach
Director
Sierra Club

[LOGO] [LOGO]

2575 E. Camelback Road
Phoenix, Arizona 85016-9225

September 14, 2002

Via Federal Express

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: *Support for ADEQ Administration of NPDES Program (see 67 Fed. Reg. 49916-20 (Aug. 1, 2002))*

Dear Mr. Mitchell:

The Greater Phoenix Chamber of Commerce and the Arizona Chamber of Commerce respectfully request that the United States Environmental Protection Agency ("EPA") approve the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollutant Discharge Elimination System ("NPDES") program (*see* 67 Fed. Reg. 49916-20 (Aug. 1, 2002)). The two chambers have over 5,000 members throughout the State of Arizona. In addition, the following organizations with over 30,000 additional members individually express their support for EPA approval of ADEQ's NPDES application and the following comments:

- American Forest & Paper Association
- Arizona Association of Industries
- Arizona Cattlemen's Association
- Arizona Farm Bureau
- AMIGOS

- Arizona Mining Association
- Arizona Rock Products Association
- Associated General Contractors (Arizona Chapter)
- Homebuilders Association of Central Arizona
- National Federation of Independent Business (Arizona)
- Southern Arizona Home Builders Association.

I. Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices throughout the state, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco. The opportunities for

face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

- *Increased understanding of local conditions.* A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B).

- *More Efficiency.* We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based and standards-based permitting requirements).

Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[1] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

- *Enhanced environmental protection.* The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

[1] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

- *The State of Arizona has shown a solid commitment to the AZPDES program.* The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future, the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

- *ADEQ is fully capable of administering this program.* In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

III. The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ, as a state agency, will not be required to formally consult with USFWS when

it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

- *AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits.* Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R. § 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) & RI8-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated

with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act*. *See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

- *Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants.* Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEQ will not adversely affect listed species.

- *Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved.* The extent of federal control and involvement in this state is pervasive. The federal government owns almost 70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

- *Private action outside of Section 7 that results in a "taking" (i.e., killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS.* This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be required to consult with SHPO.

However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state-historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G)&(H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of the current process.

EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

IV. Conclusion and Request for Approval of ADEQ's Application.

ADEQ administration of the NPDES program will result in significant benefits to our state, including protection of water quality. There is strong support from

state government to administer this program. Concerns regarding the implications of EPA approval of the AZPDES program on endangered species and historic properties have been exaggerated. These issues can and should be resolved through USFWS and SHPO cooperation with ADEQ. We therefore respectfully request that EPA approve ADEQ's application to administer the NPDES program.

We appreciate your consideration of these comments. If you have any questions or concerns regarding these comments, please contact me at your convenience at (602) 530-8221.

Sincerely,

/s/

David P. Kimball, III
Environment Committee
Chairman,
Greater Phoenix Chamber
of Commerce & Arizona
Chamber of Commerce

cc: Mr. Chris Varga, Federal Permit Unit,
Arizona Department of Environmental Quality
DPK/RAB/pgb

1045629v1

Home
Builders
Association
OF CENTRAL
ARIZONA

[Image Omitted
In Printing]

Via Federal Express

Matthew Mitchell (WTR-5)
U.S. Environmental Protection Agency Region 9
Water Division
75 Hawthorne Street
San Francisco, CA 94105

Re: ***Comments in Support for Administration of the NPDES Program by the Arizona Department of Environmental Quality 67 Fed. Reg. 49916-20 (Aug. 1, 2002)***

Dear Mr. Mitchell:

The Home Builders Association of Central Arizona ("Association") appreciates the opportunity to submit the following comments in support of the Arizona Department of Environmental Quality ("ADEQ") application to administer the National Pollutant Discharge Elimination System ("NPDES") program. *See* 67 Fed. Reg. 49916 (Aug. 1, 2002). The Association has over 800 members and represents builders, developers, contractors, and others engaged in the development and construction of single-family homes and apartments. The Association has a substantial interest in administration of the NPDES program because our members are generally required to obtain storm water permit coverage for construction activities and to comply with storm water pollution prevention planning requirements. The following discussion provides the basis for the Association's support of the Arizona Pollutant Discharge Elimination System.

I. Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices in Phoenix, Flagstaff and Tucson, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco, notwithstanding the best efforts of EPA to do so with more limited local resources. The opportunities for face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

- *Increased understanding of local conditions.* A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances

environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B).

- More Efficiency. We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based and standards-based permitting requirements). Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget

efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[1] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

- *Enhanced environmental protection.* The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program Well.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

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[1] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

- *The State of Arizona has shown a solid commitment to the AZPDES program.* The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future, the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

- *ADEQ is fully capable of administering this program well.* In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

III. The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ, as a state agency, will not be required to formally consult with USFWS when it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when

issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

- *AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits.* Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R. § 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) & R18-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act. See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That

MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

- *Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants.* Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEQ will not adversely affect listed species.

- *Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved.* The extent of federal control and involvement in this state is pervasive. The federal government owns almost

70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

- *Private action outside of Section 7 that results in a "taking" (i.e., killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS.* This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be required to consult with SHPO. However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any

event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G)&(H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of this proceeding. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten

full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

IV. Conclusion and Request for Approval of ADEQ's Application.

ADEQ administration of the NPDES program will result in significant benefits to our state, including protection of water quality. There is strong support from state government to administer this program. Concerns regarding the implications of EPA approval of the AZPDES program on endangered species and historic properties have been exaggerated. These issues can and should be resolved through USFWS and SHPO cooperation with ADEQ. We therefore respectfully request that EPA

approve ADEQ's application to administer the NPDES program.

We appreciate your consideration of these comments. If you have any questions or concerns regarding these comments, please contact the Association at your convenience at (602) 274-6545.

Sincerely,

/s/ Connie Wilhelm
Connie Wilhelm, President
Home Builders Association
of Central Arizona

cc: Mr. Chris Varga
Federal Permit Unit
Arizona Department of Environmental Quality

THE STATE OF ARIZONA
GAME AND FISH DEPARTMENT
2221 WEST GREENWAY ROAD,
PHOENIX, AZ 85023-4399
(602) 942-3000 •
WWW.AZGFD.COM

[LOGO]

Governor
Jane Dee Hull
Commissioners
Chairman,
Michael M. Golightly,
Flagstaff
Joe Carter, Safford
Susan E. Chilton, Arivaca
W. Hays Gilstrap, Phoenix
Joe Melton, Yuma
Director
Duane L. Shroufe
Deputy Director
Steve K. Ferrell

[SEAL]

September 16, 2002

Mr. Matthew Mitchell (WTR-5)
Water Division, EPA Region 9
75 Hawthorne Street
San Francisco, California 94105

RE: State Program Requirements; Application to Administer the National Pollutant Discharge Elimination System Program in Arizona (Fed. Reg. Vol. 67, Number 148, 49916-49920)

Dear Mr. Mitchell:

The Arizona Game and Fish Department (Department) has reviewed the above-referenced Federal Register notice, dated August 1, 2002, regarding state program requirements for the Arizona Department of Environmental Quality's (ADEQ) application to administer the National Pollutant Discharge Elimination System (NPDES) Program in Arizona. We understand that the State of Arizona has submitted a request for approval of the Arizona Pollutant Discharge Elimination System

(AZPDES) program. Under this request, ADEQ is seeking approval to administer a partial program for discharges of pollutants into waters under its jurisdiction. With the approval of this program, ADEQ's permitting actions would not be subject to Section 7 consultation under the Endangered Species Act. However, the Department understands that Endangered Species Act issues have been addressed in the Memorandum of Agreement (66 FR 11202) between the Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service (FWS). This agreement will serve as a guideline for EPA, FWS, and the State of Arizona to ensure that NPDES permits will not negatively impact endangered and threatened species.

The Department has worked cooperatively with ADEQ and applicants during the preliminary review of NPDES permit applications to ensure that potential impacts to special status species and other fish and wildlife resources are considered and addressed (avoided or minimized) early-on during the permitting process. We look forward to continuing this level of cooperation between our agencies, and to seek opportunities for potential habitat restoration or enhancement projects that benefit fish and wildlife resources in Arizona. Again, the Department appreciates the opportunity to comment on Arizona's NPDES Program. Please contact me at (602) 789-3605 or bbroscheid@gf.state.az.us if you have any questions regarding this letter.

Sincerely,

/s/ Bob Broscheid
Bob Broscheid
Project Evaluation Program Supervisor

cc: Regional Habitat Program Managers
Chris Varga, Federal Permits Unit, ADEQ

DRAFT Sept. 16, 2002

Summary of meeting with U.S. EPA, State of Arizona DEQ, and U.S. Fish and Wildlife Service: September 13, 2002, Phoenix, AZ.

Attendees: Steve Chambers, Tom Gatz, Carrie Marr, Debra Bills, Mima Falk (USFWS); Terry Oda, Jenny Mann, Julie Walters (EPA); Karen Smith, Chris Varga, Michele Robertson (ADEQ)

The first item of discussion was if formal consultation had begun. Terry wanted to know if EPA was in formal consultation and what date consultation started. We indicated that we were not sure, but would be getting EPA an answer this week. We would also send EPA a letter this week with the information. If formal consultation started on June 24, 2002, the BO would be due in early November. We are on record sending EPA a letter requesting additional information in response to their request for formal consultation, dated August 20, 2002.

We talked about EPA/ADEQ's deadline for program transfer and EPA said that their 90 day deadline for transfer was October 8, 2002. ADEQ stated that there were political constraints because Gov. Hull has stated that she wants the program transfer to be one of her legacies. Therefore, the program must transfer before Gov. Hull leaves office in December. The State is the only one that can grant an extension and they said that the first of November would not be unreasonable. If the State does not grant an extension, the entire program will cease until either an extension is granted or the program is transferred.

We discussed what species would be included in the consultation. EPA attached a list of all the listed species in the state, but did not request specific species for formal consultation. We agreed that the Service would determine which species would be included in the consultation.

We then discussed our concerns with aquatic and aquatic-dependent species. We all agreed that the process defined in the MOA would address aquatic concerns, but we expressed our concerns about issues of water quantity on species such as Huachuca water umbel, razorback sucker, SW willow flycatcher, and Gila topminnow. EPA stated that effects from pumping groundwater to provide water to housing developments is out of their CWA jurisdiction and they have no discretion to modify or condition permits for this type of effect.

At this point, EPA voiced their opinion on indirect effects from their action. They believe there are no indirect effects associated with the delegation because it is simply an administrative action. **We disagree** with their interpretation and told them that we have to evaluate all the effects (direct, indirect, interrelated and interdependent) regardless of whether they could do anything about those effects.

Arizona DEQ explained how they were going to handle the permit process. They are proposing a "SMART NOI" application. It would be electronically based. Applicants would answer a series of questions and the NOI's would be sorted according to the answers. There would be 3 categories: 1) waiver exemptions; 2) general permits (the majority would fall into this category); and 3) problem permits. These are NOI's that would be red flagged with having potential problems. The applicant would be notified immediately that there might be a problem and an

additional 30 days will be needed to evaluate the request. This would include effects to unique waters, impaired waters, etc. The State is willing to include information from us to include in this data layer. This information could be in the form of T and E species' range information, etc. NOI's that fall within these areas would be sent over to us for review. We can then contact the applicant. The State will assist us in setting up a meeting to discuss ways to minimize the effects. They **will not** condition permits to address upland species concerns. That is outside of their authorization. They would be willing to send out letters on our letterhead notifying applicants that they may be in violation of Sect 9. if they proceed without Service input.

The discussion turned to upland species and indirect effects. The bottom line is this: EPA believes that the MOA only addresses aquatic species and it is out of their authority and discretion, under the CWA, to address concerns to upland species. They will not federalize those permits and claim that even if they did, they could not condition the permits to address upland species. We disagree on this point. We feel that the MOA covers all listed species. We also believe that EPA has the obligation under ESA to evaluate all the effects from their action on all listed species.

EPA also stated that they will have a very minor oversight role, only becoming involved after ~~the State evaluates the NOIs~~. the FWS has disagreed with a permit, contacted ADEQ about the problem, and failed to come to a resolution. They would not agree to any kind of specific oversight role, other than what is outlined in the MOA.

EPA asked if they could delegate the program and write a 7(d) determination for that action. We asked if they could

take the program back if our opinion was jeopardy. They said probably not and we indicated that perhaps delegating the program is an irreversible or irretrievable commitment of resources.

Unable to proceed further in the discussions, the decision was made to elevate the problem to the WO. EPA had already been working on a elevation paper and they are going to send it to Steve Chambers, Steve Spangle and Debra Bills early next week. We agreed to edit and add our perspective by the end of next week.

[SEAL] **United States Department of the Interior** [LOGO]
U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210 Fax: (602) 242-2513

In Reply Refer to:

AESO/SE
02-21-02-F-0268

September 26, 2002

Mr. Terry Oda, Manager
Clean Water Act Standards & Permits
Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Mr. Oda:

This letter acknowledges the Fish and Wildlife Service's receipt of your June 21 and August 22, 2002, letters requesting initiation of formal section 7 consultation under the Endangered Species Act, as amended. The consultation analyzes the effects of the approval of Arizona's Pollution Discharge Elimination System program for all of Arizona, except on Indian lands, on federally proposed and listed species and proposed and designated critical habitat. The U.S. Environmental Protection Agency (EPA) concluded that the proposed action may affect, but is not likely to adversely affect, all listed species and critical habitat in Arizona, but also requested initiation of formal consultation for the action described in the Biological Evaluation (BE) and the preparation of a biological opinion.

At our September 13, 2002 meeting with you and the Arizona Department of Environmental Quality, (ADEQ) we state that we would make every effort to complete this consultation by November 1, 2002. We understood that a November 1 delivery of the opinion would be satisfactory to you, and that the ADEQ would be willing to grant an extension of the October 8 target date for completion of the delegation process. Given our need to conduct an extensive effects analysis, we do not anticipate providing a biological opinion prior to the November 1, date.

In keeping with our trust responsibilities to Native American Tribes, by this letter we will notify the Tribes which may be affected by this proposed action and encourage EPA to invite the Bureau of Indian Affairs to participate in the consultation process.

Also, as a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency make no irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

We look forward to working with you on completion of this consultation. If we can be of further assistance, please contact Carrie Marr (x214) or Debra Bills (x239).

/s/ Steven L. Spangle
Steven L. Spangle
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Project Leader, Fish and Wildlife Service, Pinetop, AZ (Attn: M. Stegman)
Assistant Field Supervisor, Tucson Suboffice, Tucson, AZ
John Kennedy, Arizona Game and Fish Department, Phoenix, AZ
Karen Smith, Arizona Department of Environmental Quality, Phoenix, AZ
Director, Arizona Game and Fish Department, Phoenix, AZ
Regional Supervisor, Arizona Game and Fish Department, Tucson, AZ
Director, Navajo Fish and Wildlife Department, Window Rock, AZ
Director, Bureau of Indian Affairs, Phoenix AZ
Pascua Yaqui Tribe, Tucson, AZ
Pueblo of Zuni, Zuni, NM
Tohono O'odham Nation, Sells, AZ
Yavapai Apache Nation, Camp Verde, AZ
Colorado River Indian Tribes, Parker, AZ
Fort McDowell Yavapai Nation, Fountain Hills, AZ
Gila River Indian Community, Sacaton, AZ
Havasupai Tribe, Supai, AZ
Hualapai Nation, Peach Springs, AZ
Kaibab Band of the Paiutes, Fredonia, AZ

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Sherry Barrett

10/26/2002 04:23 PM

To: Steve Spangle/R2/FWS/DOI@FWS, Mima Falk/R2/FWS/DOI@FWS, Scott Richardson/R2/FWS/DOI@FWS, Kim Hartwig/R2/FWS/DOI@FWS, Debra Bills/R2/FWS/DOI@FWS, Carrie Marr/R2/FWS/DOI@FWS, Steve Chambers/RO/R2/FWS/DOI@FWS, Sarah Rinkevich/RO/R2/FWS/DOI@FWS

cc:

Subject: NPDES analysis

Attached is my analysis of the direction that we are taking. Please provide comments.

Sherry

[File Image Omitted In Printing]
NPDES analysis.wpd

PREDECISIONAL COMMUNICATION – NOT FOR PUBLIC RELEASE

NPDES Transfer from the EPA to the State of Arizona

On October 25, 2002, we received direction from the Regional Director through Steve Chambers to proceed with the biological opinion for the delegation of the NPDES program from EPA to the State of Arizona Department of Environmental Quality (ADEQ) in the following manner:

1. There are indirect effects of the action on pygmy-owl and Pima pineapple cactus.

2. There will be no take of pygmy-owls as a result of this action because ADEQ will notify us of permits issued in pygmy-owl habitat, and ADEQ will notify the permittee that they need to comply with section 9 of the Endangered Species Act.

3. The permittees may pursue an incidental take permit under section 10(a)(1)(B) of the ESA if their action may result in take of pygmy-owls.

4. Because the permittees may pursue a section 10 permit under the ESA to address take, or FWS Division of Law Enforcement may enforce section 9 violations, take of pygmy-owls will not occur as a result of issuance of the permit.

5. Without take, the action cannot result in a jeopardy to the species.

6. Without take, the action cannot result in a jeopardy to the species.

The above directions are analyzed below:

1. There are indirect effects of the action on pygmy-owl and Pima pineapple cactus.

- We concur that the proposed action will result in indirect effects to both the pygmy-owl and the Pima pineapple cactus that are reasonably certain to occur (see preliminary analysis below). The issuance of permits will indirectly result in the development of habitat both occupied by and necessary for survival and recovery of the species. This analysis of indirect effects is consistent with *National Wildlife Federation v. Coleman* 529 F.2d 359 (5th Circuit 1976). In that case, the court enjoined completion of a highway because the Department of Transportation failed to consider the effects to the endangered sandhill crane from future private development that would result from construction of the highway.

2. There will be no take of pygmy-owls as a result of this action because ADEQ will notify us of permits issued in pygmy-owl habitat, and ADEQ will notify the permittee that they need to comply with section 9 of the Endangered Species Act.

- The regulations at 50 CFR 402.14(i) state that: "In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), the Servic will provide with the biological opinion a statement concerning incidental take.

- Arguing that there will be no incidental take resulting from the action is contrary to the regulations, because in this case there is reasonable certainty that the take will occur. Based on the above argument, we would not need to anticipate incidental

take in any of our biological opinions, because if it were to occur, it would be enforced at that time by our Division of Law Enforcement. Clearly, this was not the intent of the regulations.

3. There will be no take of pygmy-owls as a result of this action because ADEQ will notify us of permits issued in pygmy-owl habitat, and ADEQ will notify the permittee that they need to comply with section 9 of the Endangered Species Act.

- The logic perceived behind this statement is that, because the applicant to the NPDES permit has been notified that the action is within an area inhabited by the pygmy-owl, the applicant will also seek a section 10 permit under the ESA to ensure unauthorized take does not occur.

- To date, law enforcement has been unwilling to pursue such cases even when housing developments, schools and commercial projects are constructed within pygmy-owl breeding territories.

- Pursuing future HCP's with private developers is strictly a voluntary process; without the probability of 'take' liability, landowners see no benefit in pursuing the HCP's. We have approached four developers with projects occurring within or adjacent to pygmy-owl territories; they declined our recommendation to develop HCPs, and several of those areas are now mass graded.

- We have completed one HCP in northwest Tucson and are working with another private developer to complete their HCP. We are working with Pima County, the Town of Marana, and the Altar Valley Alliance to develop regional HCP's. All are in the planning phases.

4. Because the permittees may pursue a section 10 permit under the ESA to address take, or FWS Division of Law Enforcement may enforce section 9 violations, take of pygmy-owls will not occur as a result of issuance of the permit.

- Based on our preliminary analysis of the direct and indirect effects of the action, incidental take of pygmy-owls is reasonable certain to occur. This take would, at a minimum, be in the form of harm and harassment, but may also be in the form of direct mortality and injury. Based on the conclusions of the Solicitors following the Arizona Cattle Growers Association Case (memo dated June 25, 2002), we should provide an incidental take statement in the biological opinion if take is reasonably certain to occur.

5. Without take, the action cannot result in a jeopardy to the species.

- The survival and recovery of a species cannot be premised on the enforcement of take prohibitions. In the case of the pygmy-owl, there are only 18 documented individuals in the DPS, 7 of which occur in the breeding group in NW Tucson. Protecting these 7 individuals through enforcement of section 9 would at a maximum ensure the remainder of 7 territories surrounded by development. But, in fact, our Division of Law Enforcement has not taken cases of development proposed within these territories unless we have photographs of the pygmy-owl on a particular parcel of land. Therefore, the real result may mean that the nest tree or saguaro occupied by an owl may be protected through section 9 enforcement. In the case of the Pima pineapple cactus, there is no section 9 protection for plants on non-Federal land.

- As demonstrated below in quotations from both the Regulations that implement section 7 of the Endangered Species Act and the Service's Consultation Handbook, the clear intent of assessing whether or not an action was likely to jeopardize the continued existence of a species was not equivalent to anticipating whether or not take was reasonably certain to occur.

- The term "Jeopardize the continued existence of" is defined in the Regulations as "to engage in an action that reasonably would be expected, directly, or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."

- The Handbook, page 4-35, defines "Survival" as "the species persistence, as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficiently large population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter.

- The Handbook, on page 4-35 states that "the final analysis then looks at whether, given the aggregate effects, the species can be expected to both survive and recover, as those terms are defined above. For the jeopardy analysis, this survival is framed in terms of the species' reproduction, numbers, and distribution."

- The preamble to the Regulations, on page 19934 states that "The 'continued existence' of the species is the key to the jeopardy standard, placing an emphasis on injury to a species' 'survival.' However, significant impairment of recovery efforts or other adverse effects which rise to the level of "jeopardizing" the continued existence of a listed species can also be the basis for issuing a 'jeopardy' opinion. The Service acknowledges that, in many cases, the extreme threats faced by some listed species will make the difference between injury to 'survival' and to 'recovery' virtually zero."

- The preamble to the Regulations, on page 19934 states "the very concept of 'jeopardy' is that a Federal agency should not authorize, fund, or carry out an action that would injure a listed species' chances for survival to the point that recovery is not attainable.

- The preamble to the Regulations on page 19935 states ". . . habitat destruction can be the basis for a jeopardy opinion in appropriate cases."

- The preamble to the Regulations (page 19954) states that [The] provision for incidental take in no way affects a Federal agency's responsibility under section 7(a)(2) to ensure that its action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

- The preamble to the Regulations states (page 19954) that "the amount or extent of take should not be set at the threshold of likely jeopardy. If the establishment of such a high taking level were necessary to cover all impacts of a proposed action, it is questionable whether the issuance of a 'no jeopardy' opinion is appropriate.

- In the case of the NPDES transfer, we anticipate that all pygmy-owls in NW Tucson, and possibly at the northern edge of the Altar Valley would be incidentally taken as a result of the action.

6. Without take, the action cannot result in a jeopardy to the species.

- The take prohibitions for pygmy-owl will not provide protection for the Pima pineapple cactus. Occupied habitat for the pygmy-owl and the Pima pineapple cactus are only known to overlap in the Altar Valley. There are no Pima pineapple cactus in NW Tucson, where the majority of the indirect effects of the NPDES program will affect the pygmy-owl, and there are no current records of the pygmy-owl in Green Valley, where the majority of the indirect effects of the NPDES program will affect the Pima pineapple cactus.

- Within the next 20 years, development is likely to proceed in the northern end of the Altar Valley where both pygmy-owls and Pima pineapple cacti occur. However, the prohibitions of take for the pygmy-owl are not likely to provide protection to the cactus due to the limited numbers of pygmy-owls in this area and the difficulties in demonstrating that take is reasonably certain to occur. In addition, pygmy-owls in the Altar Valley spend the majority of their time in tree-lined drainages within this grassland community, whereas Pima pineapple cacti are found on the upland benches above the drainages.

Preliminary Analysis of Indirect Effects

The historical range of the pygmy-owl includes portions of Maricopa, Pinal, Cochise, and Pima counties. The pygmy-owl is known to be extant only in Pima and Pinal counties.

The historical range of the Pima pineapple cactus includes portions of Pima and Santa Cruz counties. Pima pineapple cactus remains extant in both counties.

For both species, the analysis of indirect effects of the action are focused on Pima County, because the majority of the remaining populations of both species occur in Pima County, and Pima County has developed the most robust assessment of projected growth patterns of the counties of concern.

Most current development in eastern Pima County has been occurring in the NW Tucson/Marana area and in SE Tucson/Sahuarita. Effects of development to the pygmy-owl have been most severe in NW Tucson/Marana area, and are expected to increase significantly elsewhere, especially in Pinal County and the north end of the Altar Valley.

These areas of current and expected high development are mostly comprised of private lands with some parcels of State Trust lands.

In their *Cost Model for Section 10 Endangered Species Act Compliance for all Impacts in the Unincorporated Area of Pima County* (May 23, 2002), Pima County conservatively estimates a population increase over the next 20 years of 100,000 people in unincorporated areas of eastern Pima County (The Pima Association of Governments estimated a population increase of 36,680 over the next twenty years, with more than half of that amount (just over 19,000) arriving in the next decade). This population increase would require 44,843 new housing units. At current densities of 3,000 persons per square mile, the footprint of this growth will be 33.3 square miles.

Pygmy-owl.

The pygmy-owl exists in four known breeding groups in Arizona: Organ Pipe Cactus National Monument, Altar Valley, NW Tucson, and southern Pinal County. There is likely a fifth breeding group on the Tohono O'odham Nation, but the numbers and distribution of pygmy-owls on the Nation are not known.

NW Tucson is roughly described as east of Interstate 10, north of Cortaro Farms Road, west of La Cholla Boulevard, and south of 13600 N street alignment to the north. Contrary to its name, this area is mainly within the jurisdictions of Pima County and the Town of Marana.

Pima County estimates that there are 4,063 acres of private vacant land (859 parcels) and 996 acres of State vacant land within unincorporated areas of NW Tucson. Based on the total of approximately 5000 acres of unincorporated Pima County lands in NW Tucson, Pima County estimates that 3,185 people could populate this area over the next 20 years, requiring 1,428.5 homes. Pima County expects that the entire 4,063 acres would be developed within the next 20 years (Maeveen Behan, Pima County, pers. comm).

For the Town of Marana, the Pima Association of Governments (PAG) estimates a population increase over the next 20 years of 50,000. The Town of Marana estimates that 20 percent of that population growth (10,000-15,000) will occur in the NW Tucson area. The footprint of this growth is estimated to be 5,000 to 6,000 acres (Andy Laurenzi, Town of Marana, pers. comm.).

There are a total of 33,423 acres of land within the jurisdictions of Pima County and the Town of Marana in

NW Tucson,, much of which of which has already been developed at high densities. The private lands in NW Tucson within the jurisdictions of Pima County and the Town of Marana total 21,292 acres. Combining the growth estimates of Pima County and the Town of Marana, there are approximately 11,000 acres of land anticipated to be developed in the next 20 years in NW Tucson.

Developments that result in greater than 5 acres of grading require either an individual permit under section 402 of the Clean Water Act or authorization under the CWA Construction General Permit. Transfer of the NPDES will therefore result in the following indirect effects to the pygmy-owl:

The survival of the pygmy-owl will be compromised through the development of habitat around current nest sites. This loss, degradation and fragmentation of habitat will preclude the ability of the pygmy-owl to disperse from nest sites to establish new territories and to reoccupy vacated territories. Isolation of these nesting sites by development will also preclude the ability of pygmy-owls to find mates. Without the ability to establish new territories or maintain existing territories, the overall survival of this breeding group is not likely to persist. The loss of this breeding group in Arizona will jeopardize the continued existence of the species in AZ because of the following factors:

> Distribution: The loss of the breeding group in NW Tucson would significantly reduce the distribution of the pygmy-owl in Arizona. The NW Tucson breeding group represents 1 of 4 recognized breeding groups in Arizona. Because NW Tucson provide an important connection between pygmy-owls in southern Pinal County and those east of Interstate 10, loss of this

breeding group would also likely result in the eventual extirpation of pygmy-owls in southern Pinal County, further reducing the remaining distribution of the species.

Numbers: The NW Tucson breeding group represented 35 percent of the known population and 40 percent of the known nesting sites in AZ in 2001. Loss of these pygmy-owls to the DPS would represent a significant reduction in the overall population and appreciably reduce the species likelihood of survival and recovery.

Reproduction: The NW Tucson breeding group has produce 3.3 nests/year and total young of 12.6/year, which has resulted in 3.8 young/nest/year. This productivity is higher than any of the other 3 known breeding groups in the State and important to the overall ability of the species to survive and recover.

Pinal County encompasses 5,370 square miles north of Pima County. Private lands account for 35.3 percent of Pinal County and State Trust lands account for 35.3 percent. Pinal County's 2001 Comprehensive Plan states that the county is experiencing rapid growth and transition from a primarily agricultural center to a commercial, industrial and recreational one. In 2001, the population of the county total 179,727. From 1990 to 2000, the population of Pinal County increased 54.4 percent, a rate higher than the state wide percent change of 40 percent. Pinal county projects a 60 percent increase in population in the next decade with annual growth projected at 2.8 percent. Urban areas are currently experiencing the most intense commercial and residential development, but the Comprehensive Plan anticipates that

many rural areas will grow rapidly in the next decade *(Pinal County Comprehensive Plan*, January 19, 2002).

Pima pineapple cactus

The Pima pineapple cactus occurs in a restricted range within Pima and Santa Cruz counties. Major population areas are located in Green Valley and the Altar Valley. The species is affected by development mostly in Green Valley along the Interstate 19 corridor in Pima County and the Town of Sahuarita.

Similar to the analysis of the pygmy-owl above, the Pima pineapple cactus will be adversely affected by the indirect effects of the development that will result from the issuance of NPDES permits.

Pima County's Sonoran Desert Conservation Plan anticipates increased development in the SE Tucson/Green Valley areas, as these areas are accessible to infrastructure and water. This increased development will directly affect Pima pineapple cactus, which occurs generally in the most developable portions of land (e.g., out of the drainages and off of the steep slopes).

Gary D Frazer

09/27/2002 08:14 AM

[Image Omitted In Printing]

To: Craig Manson/ASFW/OS/DOI@DOI

cc: David P Smith/ASFW/OS/DOI@DOI, Clint Riley/ARI/R9/FWS/DOI@FWS, Patrick Leonard, Elizabeth Stevens/ARI/R9/FWS/DOI@FWS

Subject: Consultation on AZ NPDES delegation

Knowing of your interest in this, Dale Hall asked me to pass on that EPA has backtracked on their commitment to consider both the direct and indirect effects of permits issued in any consultation with the Service or negotiation with the state relating to the AZ NPDES program delegation. They told Dale this week that they will only address impacts to listed species directly related to water quality. This is at odds with the MOA we have with EPA and, of course, the sec 7 regs. May be something for which we'll have to engage with EPA HQ in the future, if Dale is unable to get them back on track. – GDF

DATE: October 9, 2002

BRIEFING FOR THE ASSISTANT DIRECTOR FOR ENDANGERED SPECIES

PREPARED BY:	Michael Horton, National Section 7 Coordinator, Branch of Consultation and HCPs
FROM:	Patrick Leonard, Chiefs Division of Consultation, HCPs Recovery, and State Grants
SUBJECT:	Elevation of EPA's proposed approval of Arizona's NPDES permitting Program
PURPOSE:	To explain EPA's and Region 2's positions on this issue and the broader implications

ISSUES: The Clean Water Act (CWA) MOA signed between the EPA and Service in 2001, includes a commitment by EPA to consult under section 7 of the ESA whenever it considers delegating the CWA section 402 program to State or Tribal authorities. The MOA also establishes a process whereby once the NPDES permitting process is assumed by a State, the Service reviews and comments on individual permit requests and objects to those that will have inappropriate effects to listed species. This provides the opportunity for the State and Service to resolve permit issues that may affect listed species. In the event that such resolution cannot be achieved, and if issuance of the proposed permit would result in "more than minor" adverse effects, the Service can request that EPA federalize the permit, thus making it subject to the requirements of section 7.

In Arizona there are at least two upland species that will be affected by the transfer of the NPDES program; the cactus ferruginous pygmy-owl and Pima pineapple cactus. However, the potential impacts of concern are non-water quality related impacts from future projects (e.g., construction impacts, water usage, etc.). Notwithstanding the assertion in the MOA that EPA's CWA authorities are sufficiently broad and the MOA sufficiently flexible to address the broad range of situations that arise in the NPDES program, EPA now asserts that based on the 1998 5th Circuit Court of Appeals' decision (AFPA v. EPA, 137 F.3d 291), they have no authority to federalize permits because of non-water quality effects to listed species. In this case the Circuit Court ruled that the plain language of section 402(b) of the CWA directs EPA to approve proposed State programs that meet certain identified criteria and that approval of such programs is non-discretionary; in other words, if the program meets the nine criteria identified in section 402(b) of the CWA, the Administrator of EPA must approve the State's program. Finally the Court ruled that EPA cannot use the ESA to impose requirements that are not authorized by the CWA.

The Service argues that due to EPA's position that once the program is assumed by the State EPA lacks the authority to object to future permits based on upland impacts to species, there will be a reduced level of protection for listed upland species that we know are adversely affected by projects that cannot move forward without NPDES permits. This reduction in protection may result in a jeopardy determination on EPA's proposed approval of the State's program.

Section 7 Implications: While EPA may argue that they have no discretion to address non-water quality

related upland impacts to listed species, they do have discretion to address issues. relating to both aquatic and upland listed species if they are water quality-related. Therefore, as long as the transfer of an NPDES process to a State will affect at least one aquatic listed species or an upland listed species that may be impacted by poor water quality, the transfer qualifies as a discretionary action subject to section 7 consultation regardless of EPA's position. Once section 7 is initiated, the Service must analyze all potential effects (i.e., direct, indirect, and cumulative effects). When analyzing indirect effects, the action agency's ability to control those effects is irrelevant to the analysis; in other words, if indirect effects that the action agency has no control over will result from the action, these effects must be analyzed. This could result in a jeopardy determination with no RPA as there may be nothing within the action agency's authorities that they can do to avoid jeopardy. If this is the case when the State proposes to assume the NPDES program, using EPA's thought process, they would either have to transfer the program and be in violation of section 7(a)(2) of the ESA, or comply with section 7(a)(2) and be in violation of the CWA. The only apparent remedy would be for EPA to be granted an exemption via the ESA Exemption process (note that since there is no exemption process in the CWA for such situations, seeking an exemption from the requirements of the CWA does not appear to be an option).

MAIN DECISION OR MESSAGE: EPA's position, based on this interpretation of the 5th Circuit Court decision, would appear to create the potential for a conflict between the ESA and CWA that could only be remedied through the issuance of an ESA Exemption.

BUREAU PERSPECTIVE: The MOA signed by EPA and the Service in January, 2001, clearly committed the agencies to applying the section 7 regulations, including analysis of indirect effects, to any future assumptions of the NPDES program.

CONTACTS: Rick Sayers, Chief, Branch of Consultations and HCPs, 703/358-2442, Michael Horton, National Section 7 Coordinator, Branch of Consultations and HCPs, 703/358-2371.

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[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

October 16, 2002

Mr. Steven Spangle
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Rd.
Suite 103
Phoenix, AZ 85021

In reply, refer to WTR-5

Dear Mr. Harlow [sic]:

As you know, the State of Arizona, in accordance with the provisions of Clean Water Act Section 402(b), is requesting approval from the USEPA for the Arizona Department of Environmental Quality (ADEQ) to administer the National Pollutant Discharge Elimination System Program. The USEPA is currently in formal consultation with the U.S. Fish and Wildlife Service (Service) under Section 7 of the federal Endangered Species Act (ESA) on the effects of the USEPA's proposed approval of the Arizona Pollutant Discharge Elimination System (AZPDES) program on Federally-listed endangered and threatened species and designated critical habitat.

The purpose of this letter is to provide you with the ESA-related comments that we received during the public comment period for the proposed approval of the AZPDES program. We are sharing these comments with you so that you may take them into consideration during the consultation. The comments are as follows:

- a letter from the Navajo Nation dated September 16, 2002
- a letter from the Arizona Chamber of Commerce and the Greater Phoenix Chamber of Commerce dated September 14, 2002
- a letter from the Arizona Center for Law in the Public Interest dated September 13, 2002
- a letter from Whitey Anderson and Morris dated September 13, 2002
- a letter from Diamond Ventures Inc. dated September 9, 2002
- a letter from Mr. Bruce Nigel dated September 7, 2002
- a letter from the Arizona Association of Industries dated September 6, 2002
- a letter from the Home Builders Association of Central Arizona

If you have any questions, please contact Jenny Mann at 415-972-3512 or mann.jenny@epa.gov.

Sincerely,

/s/ [Illegible]
Terry Oda, Manager
CWA Standards and Permits Office

Enclosures

DATE: October 17, 2002

BRIEFING FOR THE SECRETARY

PREPARED BY: Steven Chambers, Senior Scientist, U.S. Fish and Wildlife Service, Region 2, Albuquerque, NM.

FROM: Dale Hall, Regional Director, U.S. Fish and Wildlife Service, Region 2,

SUBJECT: EPA's proposed approval of Arizona's NPDES (National Pollution Discharge Elimination System) permitting program

PURPOSE: To identify EPA and Service positions on this issue and their implications.

ISSUES: The Clean Water Act (CWA) MOA signed by EPA and Service in 2001 includes a commitment by EPA to consult under section 7 of the Endangered Species Act (ESA) whenever it considers approval of assumption of the NPDES permitting program by a State or Tribe. The MOA also establishes a process whereby once the NPDES program is assumed by a State, EPA and the Service will work together to identify permits that have more than a minor detrimental effect on listed species, and work with the State to reduce those effects. If issues are not resolved, the Service can request that EPA object to, and if necessary, federalize the permit.

Two upland species in particular will be affected by the transfer of the NPDES program in Arizona: the cactus ferruginous pygmy-owl and Pima pineapple cactus. The potential impacts are indirect, non-water quality related impacts from future projects (e.g., construction impacts amd [sic] water usage). Although the MOA identifies an objective to protect listed species and their critical habitat,

EPA now asserts based on the 1998 5th Circuit Court of Appeals' decision (AFPA v. EPA, 137 F.3d 291), that they have no authority to object to permits based on non-water quality effects to listed species.

Once section 7 is initiated, the Service must analyze all effects, including those that are indirect. The indirect effects of future permitted actions could result in a jeopardy biological opinion on EPA's approval of the assumption by Arizona. If, as they assert, EPA lacks the authority to address these indirect effects, then there could be no reasonable and prudent alternative to the proposed action that would avoid jeopardy. The ESA provides for proceeding with such an action only through the ESA's exemption process.

MAIN DECISION OR MESSAGE: EPA's position creates a conflict between the ESA and CWA that could only be remedied through the issuance of an ESA Exemption.

BUREAU PERSPECTIVE:
The MOA between EPA and the Service clearly committed the agencies to applying the section 7 regulations, including analysis of indirect effects, to future assumptions of the NPDES program.

CONTACTS: Bryan Arroyo, Assistant Regional Director-Ecological Services, U.S. Fish and Wildlife Service, Region 2: 505-248-6454.

THE STATE OF ARIZONA
GAME AND FISH DEPARTMENT
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[LOGO]

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Susan E. Chilton, Arivaca
W. Hays Gilstrap, Phoenix
Joe Melton, Yuma
Director
Duane L. Shroufe
Deputy Director
Steve K. Ferrell

[SEAL]

November 18, 2002

Mr. Steve Spangle
Field Supervisor
Arizona Ecological Services Field Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

Re: Draft Biological Opinion on the Transfer of the National Pollutant Discharge Elimination Program to the State of Arizona

Dear Mr. Spangle:

The Arizona Game and Fish Department (Department) completed a cursory review of the draft Biological Opinion (BO) on the Transfer of the National Pollutant Discharge Elimination System. (NPDES) Program from the Environmental Protection Agency (EPA) to the Arizona Department of Environmental Quality (ADEQ).

The administration of the NPDES Program by the ADEQ has the potential to improve interagency coordination, environmental reviews, and the overall quality of NPDES permits in Arizona. The conservation measures outlined in the Draft BO, consistent with the National Memorandum of Agreement (MOA) signed by EPA, USFWS and NMFS, should ensure the conservation of federally-listed species and designated Critical Habitats.

During the last few years, ADEQ and the Department have worked cooperatively in the review of Notices of Intent, and draft and final NPDES permits to ensure that potential impacts to fish and wildlife resources are considered and addressed. The Department provides information regarding the occurrence of special status species, potential adverse impacts to fish and wildlife resources, including listed species, and recommendations to avoid or minimize impacts to those resources. The Department is committed to continuing this level of involvement during the review of future NPDES permits and working cooperatively with ADEQ, USFWS, and EPA to develop measures that avoid and/or minimize impacts to fish and wildlife resources. We will also continue to seek opportunities to enhance fish and wildlife habitats through our work with ADEQ and the NPDES program.

The Department agrees with the USFWS that the transfer of the NPDES program to ADEQ will result in improved water quality conditions and coordination among agencies.

Please contact Bob Broscheid at (602) 789-3605 if you have any questions regarding this letter.

Sincerely,

/s/ John Kennedy
John Kennedy
Habitat Branch Chief

JK:bb

cc: Terry Johnson, Nongame Branch Chief
Larry Riley, Fisheries Branch Chief
Regional Supervisors
Bob Broscheid, Project Evaluation Program Supervisor, Habitat Branch
Karen Smith, Director, Water Quality Division, ADEQ

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

NOV 20 2002

VIA FACSIMILE AND U.S. MAIL

Steven L. Spangle
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Road
Suite 103
Phoenix, AZ 85021

Re: EPA Comments on FWS Draft Biological Opinion for EPA's Proposed Approval of the Arizona NPDES Program

Dear Mr. Spangle:

This letter provides EPA's comments on the draft Biological Opinion (80) prepared by the U.S. Fish and Wildlife Service (Service) pursuant to Section 7 of the Endangered Species Act (ESA) for EPA's proposed approval of the Arizona NPDES (AZPDES) Program. This draft was transmitted to EPA on November 14, 2002. Our primary comment are described first, and are focused on the elements of a biological opinion as described in the ESA section 7 regulations at 50 C.F.R. Part 402. Prior to your finalizing the biological opinion, we would appreciate the opportunity to discuss with your office the manner in which the Service plans to address these comments, as well as the opportunity to review a revised draft of the opinion. We will contact your office shortly to set up a time to discuss these comments.

First, the ESA consultation regulations at 50 C.F.R. section 402.14(h)(1) state that the biological opinion shall include a summary of the information on which the opinion is based. The draft BO does not appear to provide a clear summary of such information; this should be added to the final opinion.

Second, the ESA consultation regulations at 50 C.F.R. section 402.14(h)(2) and (h)(3) state that the biological opinion shall include a detailed discussion of the effects of the action on listed species or critical habitat, as well as the Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or adverse modification of critical habitat. The Service concludes in the "Effects of the Action" and "Conclusion" sections of the draft BO that EPA's proposed approval action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat, that development is not an indirect effect of EPA's approval action, and that the loss of section 7-related conservation benefits is not an indirect effect of EPA's approval of the AZPDES program. We agree with these conclusions; however, we believe that the Effects of the Action section should provide a more detailed explanation of the basis for the Service's conclusions.

Third, the biological opinion should provide a detailed discussion of the action under consideration in this consultation. Through the AZPDES program, the Arizona Department of Environmental Quality (ADEQ) will issue permits for discharges of pollutants from point sources to waters of the United States. EPA's Biological Evaluation (BE) discusses in detail what the AZPDES program regulates and how the safeguards in the Clean Water Act (CWA) and the AZPDES program, and EPA's oversight of

the AZPDES program, will provide continued protection to Federally-listed species and their critical habitat following program approval. While the "Conservation Measures" section of the document discusses EPA's oversight of the AZPDES program, to make clear the scope of EPA's action, the final Biological Opinion's (BO) "Description of the Proposed Action" section should include a discussion of what the AZPDES program regulates and the fundamental protections to be provided by the AZPDES program.

For example, the AZPDES permits must attain State water quality standards, which are developed by considering, among other things, the propagation of fish and wildlife. EPA completed section 7 consultations with the U.S. Fish and Wildlife Service (Service) on Arizona water quality standards an February 16, 1994 and on December 11, 1998. EPA will continue to consult with the Service under ESA section on its proposed approval of new or revised Arizona water quality standards that may affect listed species or designated critical habitat.

In addition to discharge limitations, NPDES permits impose other requirements such as monitoring procedures and pollution prevention measures (known as best management practices). Permits typically contain technology-based limits which represent the best conventional technology (BCT) for conventional pollutants (biological oxygen demand, total suspended solids, fecal coliform, pH, and oil and grease), best available technology economically achievable (BAT) for non-conventional and toxic pollutants, secondary treatment limits for publicly owned treatment works (POTWs), and new source performance standards (NSPS) for new sources. Where technology-based or secondary

treatment limits are not sufficient to meet WQS in receiving waters, permits must contain more stringent limits (known as water quality-based effluent limits or WQBELs) so that the receiving waters meet those WQS. The CWA requires that NPDES permits contain effluent limitations that contribute to the maintenance and attainment of water quality which assures the protection and propagation of a balanced population of shellfish, fish and wildlife.

Fourth, EPA's BE states that EPA believes that its proposed approval action may affect Federally-listed species and critical habitats in, adjacent to, or dependant on surface waters in Arizona. All relevant sections of the final BO should discuss Federally-listed species and designated critical habitats in, adjacent to, or dependent on surface waters in Arizona to make clear the Service's opinion about the effects of EPA's program approval action on these species.

Among other things, the "Status of the Species and Environmental Baseline" section of the opinion should include a brief discussion of the listed species and critical habitat that may be affected by the action, including Federally-listed species and designated critical habitats in, adjacent to, or dependent on surface waters in Arizona. The draft opinion appears to focus heavily on a discussion of past conservation activities of EPA and FWS that will benefit two species that the Service concludes will not be affected by the proposed action, but does not provide much background on the status of or baseline for those or other species. The draft appears to seek to incorporate by reference information relating to the status of the species. If such an approach is taken in the final opinion, the opinion should be more specific so that the reader can

determine the precise documents and information to which the opinion refers and how such material in relevant to the opinion.

Fifth, in various parts of the document, the Service's discussion refers to listed species but does not refer to designated critical habitat. The final BO should make clear the Service's analysis and conclusions regarding the effects on designated critical habitat for listed species as well as the species themselves.

Sixth, much of the discussion in the "Introduction" section does not appear to be critical to the conclusions in the consultation. If the Service wishes to include the discussion in the final opinion, the discussion appears to be part of the consultation history, thus the discussion seems more appropriate for that section of the document rather than the Introduction. In addition, EPA funding for the AZPDES program is an issue that our agencies have discussed previously, and reference to this issue in the biological opinion is inappropriate and should be deleted.

Our other comments are as follows:

First paragraph of the draft document: This paragraph states that the "program transfer is required under the Clean Water Act (CWA)." We suggest that this be clarified to state that CWA section 402(b) states that EPA "shall approve" a State NPDES program where the State program meets the conditions specified in CWA section 402(b) and its implementing regulations.

First paragraph of the "Introduction" section: This paragraph indicates that it is describing the contents of the letter that was sent from the Service to EPA dated August 20, 2002, as well as the contents of the letter that

was sent from EPA to the Service on August 22, 2002. However, the paragraph does not accurately reflect the contents of either letter. If the final BO includes a discussion of the contents of these letters, the text should correct these inaccuracies. In addition, the statement in the last sentence attributed to EPA is not accurate; EPA has authority to "Federalize" State permits where they are inconsistent with Clean Water Act requirements, including water quality standards.

Second paragraph of the "Introduction" section: This paragraph, and the second paragraph of the "Description of the Proposed Action" section, should make clear that ADEQ has *voluntarily* proposed to both provide copies of certain NOIs to the Service and send FWS form letters to NOI submitters.

Third paragraph of the "Introduction" section: In this paragraph, as well as the final paragraph of the "Effects of the Action" section, the reference to the "action of authority transfer considered in this consultation" should be replaced by "the program approval action considered in this consultation."

Also, the reference to ADEQ should be removed. ADEQ is not a party to the National MOA.

"Consultation History" section: The draft states that the Service initiated formal consultation on September 26, 2002. We believe that it would be more accurate to state that on that date, the Service acknowledged EPA's request for formal consultation.

"Conservation Measures" section: In the first sentences of the first and third paragraphs in the Conservation Measures section of the document, the

phrases "that may be affected by water quality impacts," and "that may be affected by water quality," respectively, should be deleted. EPA Region 9 has agreed to use the coordination process in Section IX of the National MOA to attempt to address concerns about any and all Federally-listed species and critical habitat associated with AZPDES permits, not just those species that may be affected by water quality. However, as we have pointed out, EPA does not have CWA authority to object to State NPDES permits to address non-water-quality-related concerns about listed species or critical habitat.

Similarly, the last sentence of the Conservation Measures section of the draft BO states that EPA acknowledges that the MOA process does not cover upland, terrestrial species as it considers them to be outside of its CWA authority. This is incorrect. As stated above, EPA Region 9 has agreed to follow the coordination process for AZPDES permits where there are concerns about upland, terrestrial species, while noting that it does not have CWA authority to object to State NPDES permits to address non-water-quality-related concerns about listed species or critical habitat. We believe the sentence should be corrected accordingly.

"Status of the Species and Environmental Baseline" section: The first two sentences of the third paragraph of this section (starting with "[t]he EPA currently considers") do not appear to be entirely accurate. We suggest replacing them with the following: "EPA currently conducts ESA section 7 consultations on its own NPDES permitting actions in Arizona where it finds that its action may affect listed species or critical habitat. Its consultations have considered all effects of the Federal permitting action, including indirect effects and the effects

of interrelated and interdependent actions. Effects considered have included, in some cases, construction activities and ground water pumping."

Also, the second-to-last paragraph of this section of the draft states that out of 104 NOIs received for authorization under the construction storm water permit, 72 "are a concern" for either the Pima pineapple cactus, the pygmy-owl, or both. We believe that it would be more accurate to state that the Service "believes that the NOIs may be a concern" for such species. Correspondence from the Service to EPA dated November 8, 2002 states that of 110 NOIs submitted to the Service as of November 6, 2002 for projects in Pima and Pinal counties, Arizona, "74 NOIs may have endangered species concerns based on the location information provided. However, since details outlining the projects are not provided, we do not have the ability to fully evaluate potential species concerns. Given the information provided, the enclosed table represents projects permitted by the NOI's that may be of concern."

In addition, we suggest that the first sentence of the final paragraph of this section be modified to read as follows: "In summary, the EPA has conducted a number of ESA section 7 consultations with FWS on NPDES permits in Arizona, including permits for projects requiring Federal NPDES permit coverage for storm water discharges from construction activities, and such consultations have in appropriate cases addressed effects of construction activities."

"Effects of the Action" section: In the final paragraph of the section, the word "on" should be inserted before "August 22, 2002."

"Cumulative Effects" section: We believe that it would be appropriate to include a brief discussion of the Sonoran Desert Multi-Species Conservation Plan in this section.

"Conclusion" section: In the final paragraph of the section, the word "transfer" should be changed to "approval."

Finally, ADEQ requested that we convey its comments on the draft opinion to you. We have enclosed ADEQ's comments, and concur with them.

We look forward to speaking with you soon about our comments.

Sincerely,

/s/ Terry Oda
Terry Oda, Manager
CWA Standards and Permits Office

Enclosure

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

DEC 02 2002

VIA FACSIMILE AND US. MAIL

Steven L. Spangle
Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal Palm Road
Suite 103
Phoenix, AZ 85021

Re: EPA Comments on FWS Revised Draft Biological Opinion for EPA's Proposed Approval of the Arizona NPDES Program

Dear Mr. Spangle:

This letter provides EPA's comments on the revised draft Biological Opinion (BO) prepared by the U.S. Fish and Wildlife Service (Service) pursuant to Section 7 of the Endangered Species Act (ESA) for EPA's proposed approval of the Arizona NPDES (AZPDES) Program. This draft was transmitted to EPA on November 27, 2002. We appreciate the revisions in the draft based on your consideration of the comments that we sent to your office on November 20, 2002. The following are our remaining comments, most of which are tied to the revisions that were made in the November 27 draft.

1. The ESA consultation regulations at 50 C.F.R. section 402.14(h)(2) state that the biological opinion shall include a detailed discussion of the effects of the action on listed species or critical habitat. We believe that the

revised draft provides a fuller explanation of the Service's analysis supporting the Service's conclusions that EPA's proposed approval action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat, that development is not an indirect effect of EPA's approval action, and that the loss of section 7-related conservation benefits is not an indirect effect of EPA's approval of the AZPDES program. However, we believe that additional elaboration in the opinion regarding the Service's analysis and conclusions is appropriate.

First, your November 27, 2002 cover letter states that the Service believes that the biological effects of EPA's approval action will be minimal due to the administrative nature of the proposed action. The Effects of the Action section of the revised draft opinion does not discuss direct effects of the action; we assume that this means that the Service believes that EPA's proposed approval of the AZPDES program will have no direct effects on listed species or proposed or designated critical habitat due to the administrative nature of the approval action. If this is the case, the opinion should make this clear. If not, the opinion should explain what the direct effects of the action are and how the Service's analysis of those effects leads to the Service's conclusion that EPA's proposed approval action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat.

In addition, in discussions with your office throughout the consultation process, the Service has indicated to us that it believes that any potential effects (presumably indirect) on listed species or critical habitat stemming from water quality issues associated with EPA's approval

of the AZPDES program are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated or proposed critical habitat, in light of the continuing protections of the CWA, AZPDES program, and EPA's oversight of the AZPDES program, including the EPA-Service procedures outlined in the National MOA (these protections are described in EPA's Biological Evaluation and in the Description of the Proposed Action section of the revised draft opinion). However, the Effects of the Action section of the revised draft opinion focuses on possible indirect effects associated with loss of conservation benefit and development, and contains no specific mention of the Service's findings regarding potential effects on listed species or critical habitat stemming from water quality issues associated with EPA's approval of the AZPDES program.

To make clear the Services analysis and conclusions, we believe that the Effects of the Action section of the opinion should include, perhaps after the first paragraph, at least a brief statement regarding the Service's analyses and findings pertaining to possible direct effects of the action and to potential indirect effects of the action stemming from water quality issues.

2. The first sentence of the fifth paragraph of the Effects of the Action section of the revised draft refers to "permit requests from AZPDES." As ADEQ issues permits pursuant to the AZPDES program, we believe that the correct term would instead be "permit requests under the AZPDES program."

3. The conclusion of the revised draft opinion is clear that the Service believes that EPA's approval action is not

likely to destroy or adversely modify designated or proposed critical habitat. As you know, critical habitat for the cactus ferruginous pygmy-owl was recently proposed by the Service. We believe it would be appropriate to include references to proposed or final critical habitat for the pygmy-owl and/or other species, as appropriate, to the discussion in the Effects of the Action action section of the document.

4. The third paragraph of the Description of the Proposed Action section refers to the "coordination process" but does not specify which coordination process it refers to. We suggest that the reference to "coordination process" language be changed to read "National MOA coordination process described in detail below."

5. The Consultation History section of the document includes a statement regarding discussions between our agencies concerning EPA funding of the AZPDES program. In addition, the Description of the Proposed Action section of the document refers to various State NPDES programs receiving Federal funds. As EPA finding of the State NPDES programs is not the subject of this consultation, it is irrelevant to the consultation and therefore reference to it should be removed from the opinion.

6. The last sentence in Section III.B of the Description of the Proposed Action section is repetitive and confusing to the reader, and should be removed.

7. The phrase "unless exempted under the general permit" should be added to the end of the first sentence of the second paragraph of Section IV.B of the Description of the Proposed Action section of the opinion.

8. In the fourth sentence of the fourth paragraph of Section VI.B of the Description of the Proposed Action section of the document, the phrase "will review NOI" should be replaced by "may review NOIs."

9. At the end of the first paragraph of the opinion, the word "letter" should be replaced by "opinion."

10. There is no Section II in the Description of the Proposed Action section of the document.

11. References in the revised draft opinion to EPA "authorization" of the AZPDES program should be replaced with the term "approval" of the program. We note that the term "authorization" is used in the first sentence of the Description of the Proposed Action section, the last sentence of Section III.B of that section, in the second sentence of Section IV.A of that section, and the second sentence of Section IV.B of that section.

12. In the second paragraph of the Consultation History section of the document, we suggest replacing the phrase "species conservation required of Federal agencies under the ESA" (that appears in the sentence starting with "however") with the following phrase: "species conservation equivalent to that required of Federal agencies under section 7 of the ESA."

13. In the first sentence of the third paragraph of the Description of the Proposed Action section, we suggest that the phrase "any listed species or their critical habitat, including aquatic-dependent species and" prior to the word "upland."

14. We note that your cover letter dated November 27, 2002, enclosing the revised draft biological opinion, states that in EPA's Biological Evaluation, EPA concluded

that all listed species and critical habitat in Arizona are in, adjacent to, or dependent on surface waters in Arizona. The list of species attached to the Biological Evaluation were those that we determined to be in, adjacent to, or dependent on surface waters in Arizona.

Thank you for your consideration of these comments. Please contact me at your earliest convenience to discuss them prior to finalizing the biological opinion.

Sincerely,

/s/ Terry Oda
Terry Oda, Manager
CWA Standards and
Permits Office

[SEAL] **United States Department of the Interior** [LOGO]
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In Reply Refer to:

AESO/SE
2-21-03-F-0014

December 4, 2002

Terry Oda, Manager
CWA Standards & Permits Office
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105-3901

Dear Mr. Oda:

This biological opinion (BO) responds to the Environmental Protection Agency (EPA) request for consultation with the U.S. Fish and Wildlife Service (FWS) pursuant to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), as amended (ESA). Your request for formal consultation was dated October 17, 2002, and received by us on October 18, 2002. At issue are impacts that may result to the Pima pineapple cactus (*Coryphantha scheeri* var. *robustispina*) (PPC) from the proposed issuance of a National Pollution Discharge Elimination System (NPDES) permit to Asarco, Inc. for the Mission Complex located near Sahuarita, Pima County, Arizona. Your letter states that the State of Arizona has requested delegation to administer the

NPDES program and you have requested expedited consultation.

The EPA determined that this action will not affect the endangered cactus ferruginous pygmy-owl (CFPO) (*Glaucidium brasilianum cactorum*). We concur with EPA's finding based on the fact that Asarco has agreed to work outside the CFPO breeding season (February 1-July 31) to install their stormwater control facilities. Surveys for the CFPO were conducted in 2002, on TON lands, and no CFPO were detected. Surveys will be completed in 2003 for the stormwater control facilities on TON land before work is initiated. If a CFPO is detected in the 2003 surveys, depending on the location, all reasonable effort shall be made by EPA, Asarco, and TON to determine the breeding status, location, and extent of the territory. Construction maybe delayed until the applicants coordinate with FWS and we determine whether the taking of CFPO is not likely to result. If we are unable to make such a determination, EPA will reinitiate consultation on this action. The FWS shall work expeditiously with you, Asarco, and TON to resolve any issue that may arise from the detection and shall not unreasonably withhold authorization to proceed with the proposed action. We agree with Asarco that CFPO surveys are not needed on their private lands because of the insignificant amount of suitable habitat that is proposed for disturbance.

This BO is based on information provided in the September 23, 2002, draft biological assessment (BA), meetings, and other sources of information. Literature cited in this BO is not a complete bibliography of all literature available on the species of concern, general mining activities and its effects, the project area, or other

subjects considered in this opinion. A complete administrative record of this consultation is on file at the Arizona Ecological Services Field Office.

Consultation History

July 15, 2002: Staff from Asarco and FWS met to discuss issues related to the consultation.

October 4, 2002: FWS provided preliminary written review of draft BA to Asarco.

October 18, 2002: FWS received EPA's request for initiation of formal consultation.

October 31, 2002: Conference call with Asarco, EPA and FWS to discuss comments on the BA.

November 19, 2002: Asarco met with FWS to finalize conservation measures.

November 27, 2002: Asarco sent supplementary information and modification to the proposed action to EPA and FWS.

BIOLOGICAL OPINION

DESCRIPTION OF THE PROPOSED ACTION

The Mission mining operation is located approximately 20 miles southwest of Tucson, Arizona. The Proposed Action is located on the following Township and Range coordinates based on the Arizona Gila and Salt River Baseline and Meridian: T16S, R12E, Sections 13, 14, 23-25; T16S R13E, Sections 20, 21, 28-30; T17S, R12E, Sections 1-3, 10, 11, and T17S, R13E, Sections 3-10, and 15.

The BA (Gault Group, 2002) addresses two actions: the construction and maintenance of stormwater controls in compliance with the Asarco Mission Complex Stormwater Pollution Prevention Plan (SWPPP); and the ultimate footprint of mining operations on leased single allotments and district lands of the San Xavier District of the Tohono O'odham Nation (TON) as described in the Mine Plan of Operations (MPO) submitted to the Bureau of Land Management (BLM) in March of 2001. The NPDES permit for which EPA is seeking consultation would only cover the stormwater controls. The proposed action will also require a section 404 permit from the U.S. Army Corps of Engineers. The expansion of mining operations would be a future Federal action to be authorized by the BLM or the Bureau of Indian Affairs and is therefore not included within the scope of this consultation.

Asarco is proposing to construct and maintain stormwater run-on and run-off controls in a corridor around the existing mine operation footprint on both privately owned and leased TON lands in compliance with the SWPPP. Mission Mine is in the process of determining specific engineering designs, however, the total width of the disturbed area would not exceed 50 feet. The proposed action would be located at the toe of waste rock dumps and tailing impoundments that surround the main Mission open pit mine and the San Xavier North and South open pit mines.

The stormwater controls would consist of a combination of excavated soil channels, berms, impoundments, and reclamation in conjunction with each other to:

1. Minimize the amount of stormwater run-on to the Mission mine facilities;

2. Minimize overland flow of stormwater collected by run-on controls by placing outfalls at existing discrete conveyances (washes); and

3. Collect, route, and store stormwater run-off from mine facilities from a 100-year, 24-hour storm event on mine-owned or leased property.

Controls would include energy dissipation structures and riprap to minimize erosion of channels. Maintenance activities would include the resizing and armoring of existing stormwater controls for a 100-year, 24-hour storm event. Future maintenance of existing and proposed stormwater controls will also include the repair of erosion of reclaimed benches, berms, and channels, and removal of sediment from impoundments on a routine basis to preserve the 100-year, 24-hour capacity. The approximate total area of disturbance from the construction and maintenance of these stormwater controls is 165 acres; 60 acres on TON and 105 acres on private land. There are 17 PPC that will be affected by the proposed action; 13 occur on San Xavier-leased land and 4 occur on private land. Not all of the area proposed for disturbance will be lost, only 58.5 acres will be permanently removed as PPC habitat; 23.5 acres on TON and 35 acres on private land.

Proposed Conservation Measures

EPA, Asarco, and TON propose the following measures to minimize potential adverse effects to PPC and its habitat:

1. Stormwater controls will be designed in such as way as to avoid individual PPC and areas of PPC concentration insofar as practicable while complying with the SWPPP.

2. The release of channelized run-on stormwater at SWPPP-designated outfalls will be directed into existing ephemeral drainages rather than as sheetwash dispersed over the general area. No PPC or suitable PPC on the Mission complex, or adjoining areas beyond the footprint of the Mission complex, will be adversely affected by discharge of stormwater or invasion of exotic plants as a result of excess water, erosion, or deposition of excessive amounts of silt or other materials.

3. TON has jurisdiction over PPC on their lands and the disposition of the 13 PPC located on TON lands will be determined by TON, San Xavier natural resources staff, and Asarco before removal

4. The proposed action will result in the permanent removal of 58.5 acres of PPC habitat. Asarco is going to expand their existing 877-acre conservation easement by 58.5 acres to compensate for the loss of PPC habitat. The location of this area will be within the Mission complex, but not necessarily adjacent to the existing easement. The location will be coordinated with the FWS within one year of the date of this opinion.

5. The four PPC that are on private lands within the Mission complex will be transplanted to Asarco's PPC conservation easement

STATUS OF THE SPECIES

Pima Pineapple Cactus

Life History

The final rule listing Pima pineapple cactus as endangered was published September 23, 1993 (58 FR 49875). The rule became effective on October 25, 1993; critical habitat was not designated at that time. Factors that contributed to the listing include habitat loss and degradation, habitat modification and fragmentation, limited geographic distribution and plant species rareness, illegal collection, and difficulties in protecting areas large enough to maintain functioning populations. The biological information below is summarized from the proposed and final rules, and other sources.

Pima pineapple cactus is a low-growing hemispherical cactus with adults varying in stem diameter from 5.0 cm (2.0 inches) to 21.0 cm (8.3 inches) and height from 4.5 cm (1.8 inches) to 45.7 cm (18.0 inches). Individuals are considered adults when they reproduce sexually. Plants can be either single or multi-stemmed with yellow flowers blooming with the summer rains. Clusters of Pima pineapple cactus stems are formed primarily from vegetative clones produced at the plant base (Benson 1982, Roller 1996). The diagnostic field character of this taxon is the presence of one stout, straw-colored, hooked central spine. Radial spines extend laterally around the central spine and average 10 to 15 spines on large cacti and 6 on small cacti (Benson 1982).

Pima pineapple cactus occurs south of Tucson, in Pima and Santa Cruz counties, Arizona and adjacent northern Sonora, Mexico. It is distributed at very low densities

throughout both the Altar and Santa Cruz Valleys, and in low-lying areas connecting the two valleys.

Groups of flowers begin to bloom for single day periods following five to seven days after the first monsoon rains. Flowering is triggered by as little precipitation as 3 mm (0.12 inches).

Generally flowers begin opening midmorning and close at dusk (Roller 1996). Adult plants bloom one to three days each year; flowering is usually over by the end of August. Cross-pollination produces significantly more viable seeds than self-pollination. Fruits are mature within two weeks following successful pollination. Germination has been observed in the field during the summer monsoon rainy season (Roller 1996). Anecdotal observations indicate the species' flowers are visited by a variety of native bees and European honey bees, which have been observed to leave the flowers with their forehead and hind legs covered in Pima pineapple cactus pollen.

Habitat fragmentation and isolation maybe an important factor limiting future seed set of this cactus. Recent data show that the species cannot successfully self pollinate *in situ* and is reliant on invertebrate pollinators. One hypothesis is that the spatial distribution pattern of individual Pima pineapple cacti within a given area may regulate pollinator visitations, thus resulting in more successful cross-pollination and subsequent seed set over the population (Roller 1996). If the pollinators are small insects, with limited ability to fly over large distances, habitat fragmentation may contribute to a decrease in pollinator effectiveness with a subsequent decrease in seed set and recruitment.

Population Stability

Extrapolations from recent (1992-1997) surveys of known Pima pineapple cactus locations suggest that the cactus may be more numerous than previously thought. Projections based only on known individuals may underestimate the total number of individuals. This in no way indicates that the cactus is not rare or endangered. Pima pineapple cactus is widely dispersed in very small clusters across land areas well suited for residential, commercial, or mining development. Field observations suggest a great deal of land area within the range boundaries would not support Pima pineapple cactus today due to historical human impacts. Thus, populations are already considerably isolated from each other in many portions of the range, and population size and apparent recruitment varies significantly across the range. On a more local scale, population variability may relate to habitat development, modification, and/or other environmental factors such as slope, vegetation, pollinators, dispersal mechanisms, etc.

The transition zone between the two regions of vegetation described by Brown (1982) as semidesert grassland and Sonoran desert-scrub contains denser populations, better recruitment, and individuals exhibiting greater plant vigor. Vegetation within this transition zone is dominated by mid-sized mesquite trees, half shrubs (snakeweed, burroweed, and desert zinnia), and patches of native grass and scattered succulents. Because populations are healthier in this transition zone, conservation within these areas is very important (Roller and Halvorson 1997). However, this important habitat type is not uniformly distributed throughout the plant's range. Populations of Pima pineapple cacti are patchy, widely dispersed and

highly variable in density. The higher population densities have only been documented at three sites. Compared to other surveys, two of these sites are very small in scale and range from 6.3-7.5 plants per ha (1-3 plants per acre). Other densities across the majority of the plant's range vary between one plant per 1.9 ha (4.6 acres) and one plant per 8.5 ha (21 acres) (Mills 1991, Ecosphere 1992, Roller 1996).

Land areas surrounding developed parts of Green Valley and Sahuarita, Arizona, (including adjacent areas of the San Xavier District of the Tohono O'odham Nation) may be important for the conservation of this species within its range. Analysis of surveys conducted from 1992 to 1995 with a multivariate statistical analysis documented a pattern of greater population densities, higher ranks of cactus vigor, and reproduction occurring within the transition vegetation type found in this area of the northern Santa Cruz Valley (Roller and Halvorson 1997). This area could be defined as an ecotone boundary between semidesert grassland and Sonoran desert scrub.

Seedling and sub-adult size classes are uncommon in documented populations across the range. However, this may be a function of the difficulty of finding such small, well-camouflaged plants in a large-scale survey, or because the establishment phase of the seedling may be limited in some unknown way. Research on Pima pineapple cactus reproduction has suggested that the establishment phase of Pima pineapple cactus life history may limit recruitment within populations (Roller 1996). Evidence presented to support this conclusion was the abundance of flowers, fruits, and viable seed, and the rarity of seedling presence at different sites spread throughout the plant's range (Roller 1996). Other research has confirmed that the

establishment phase of other Sonoran cacti species may be critical for survival to reproductive maturity (Steenbergh and Lowe 1977).

Status and Distribution

Generally, the Pima pineapple cactus grows on gentle slopes of less than 10 percent and along the tops (upland areas) of alluvial bajadas nearest to the basins coming down from steep rocky slopes. The plant is found at elevations between 720 m (2,362 ft) and 1,440 m (4,593 ft) (Phillips et al. 1981, Benson 1982, Ecosphere 1992), in vegetation characterized as either or as combination of both the Arizona upland of the Sonoran desert scrub and semidesert grasslands (Brown 1982).

The acquisition of baseline information began with surveys documenting the presence of Pima Pineapple cactus as early as 1935. More intensive surveys were initiated in 1991 and other research established in 1993 further investigated the reproductive biology, distribution, fire effects, and mortality associated with various threats. Therefore, the best available baseline information is relatively recent and may not represent actual changes in distribution since the decline in the status of the species began.

Widely scattered surveys have been conducted across sites that varied considerably in cacti density. Densities ranged between 0.1-7.5 plants per ha (0.05-3 plants per acre). Pima pineapple cactus occurs in 50 townships within its U.S. range. However, a considerable amount of land area within the range boundaries does not provide habitat for the species due to elevation, topography, hydrology, plant community type, and human degradation. To date, an

estimated 22,959 ha (56,730 acres), (10 to 20 percent of the U.S. range) have been surveyed. Not all of this area has been intensively surveyed; some has only been partially surveyed using small land blocks to estimate densities rather than 100 percent ground surveys. A conservative estimate of total cacti located to date would be 3,800 individuals. The majority of those were located after 1991.

It is important to clarify that the above number represents the total number of locations ever found and not the current population size. It would be impossible to estimate densities over the remaining unsurveyed area because of the clumped and widely dispersed pattern of distribution of this species. Of the 3,800 individuals recorded to date, 2,203 (58 percent) of them have been removed throughout the range. This quantity includes observed and authorized mortalities and individuals transplanted since the species was listed in 1993 to present A small portion of these mortalities were caused by natural factors (i.e., drought). Moreover, this figure does not take into account those cacti that are removed from private land or lost to other projects that have not undergone section 7 review.

Transplanted individuals are not considered as functioning within the context of a self-sustaining population. Efforts to transplant individual cacti to other locations have only had limited success and the mortality rate has been high, especially after the first year. Furthermore, once individuals are transplanted from a site it is considered to be extirpated as those individuals functioning in that habitat are irretrievably lost. We view transplanting cacti as a measure of last resort for conserving the species. Transplanting will be recommended only when on-site and off-site habitat conservation is not possible and the death of cacti is unavoidable.

The area of habitat reviewed under section 7 between 1987 and 2000 (i.e., habitat developed or significantly modified beyond the point where restoration would be a likely alternative) is approximately 9,886 ha (24,429 acres) which represents 43 percent of the total area surveyed to date. In 1998, more than 445.5 ha (1,100 acres) of Pima pineapple cactus were lost including 143 ha (353 acres) from the Las Campanas Housing Development project, and 304.6 ha (752 acres) from the ASARCO, Inc. Mission complex project. In 2000, 237.3 ha (586 acres) of habitat were lost with the expansion of a state prison in Tucson. In 2001, 71.7 ha (177 acres) of habitat were lost through development, but 375.8 ha (888 acres) of occupied and suitable habitat were conserved through conservation easements. We are aware of housing developments along Valencia Road, Pima County, Arizona, in the vicinity of T15S, R12E, Section 15 and surrounding areas, that support Pima pineapple cactus. These developments affect several hundred acres of habitat and have not been evaluated through the section 7 process. The number of acres lost through private actions, not subject to Federal jurisdiction, is not known but given the rate of urban development in Pima County, we believe that it is significant.

Most of the documented habitat loss has occurred south of Tucson down through the Santa Cruz Valley to the town of Amado. This area is critical for the fixture recovery of the species. The expansion of urban centers, human population, and mining activities will continue to eliminate habitat and individuals, and result in habitat fragmentation.

The protection of habitat and individuals is complicated by the varying land ownership within the range of this

species. An estimated 10 percent of the potential habitat for Pima pineapple cactus is held in Federal ownership. The remaining 90 percent is on Tribal, State, and private lands. Most of the federally owned land is either at the edge of the species' range or in scattered parcels. The largest contiguous piece of federally owned land is the Buenos Aires National Wildlife Refuge, located at the southwestern edge of the species' range at higher elevations and lower plant densities.

Based on surveys and habitat analysis, areas south of Tucson through the Santa Cruz Valley to the town of Amado and surrounding developed parts of Green Valley and Sahuarita, and parts of the San Xavier District of the Tohono O'odham Nation, appear to support abundant populations, some recruitment, and units of extensive habitat still remain. However, the primary threat to the status of this species throughout its range is the accelerated rate. (i.e., since 1993) at which this prime habitat is being developed, fragmented, or modified.

Under section 9 of the Act, the taking of listed animals is specifically prohibited, regardless of landownership status. For listed plants, these prohibitions and the protection they afford do not apply. Listed plant species are protected only from deliberate removal from Federal lands. There is no protection against removal from, or destruction of, plants on any non-Federal lands under the Act by a land owner. The Arizona Native Plant Law may delay vegetation clearing on private property for the salvage of specific plants species within a 30-day period. Although the Arizona State Native Plant Law does prohibit the illegal taking of this species on state and private lands without a permit for educational or research purposes, it

does not provide for protection of plants *in situ* through restrictions on development activities.

Based on current knowledge, the following threats documented with this reduction in habitat alter the landscape in a manner that would be nearly irreversible in terms of supporting Pima pineapple cactus populations: urbanization, farm and crop development, and exotic species invasion. Prescribed fire can have a negative effect if not planned properly.

Other specific threats which have been previously documented (U.S. Fish and Wildlife Service 1993), such as overgrazing and mining, have not yet been analyzed to determine the extent of effects to this species. However, partial information does exist and can be applied. Mining has resulted in the loss of hundreds, if not thousands, of acres of potential habitat throughout the range of the species. Much of the mining activity has been occurring in the Green Valley area, which is the center of the species' distribution and the area known to support the highest densities of individuals. Overgrazing by livestock, illegal plant collection, and fire-related interactions involving exotic Lehmann lovegrass *(Eragrostis lehmanniana)* may also negatively affect Pima pineapple cactus populations (U.S. Fish and Wildlife Service 1993).

Even with complete data on historical change related to Pima pineapple cactus distribution and abundance, we cannot reliably predict population status due to compounding factors such as climate change, urbanization, legal, and political complexities (McPherson 1995). We do not know if the majority of populations of Pima pineapple cactus can be sustainable under current reduced and fragmented conditions. Thus, there is a need to gather

information on limits to the plant's distribution under current habitat conditions.

Based on monitoring results, the range-wide status of the Pima pineapple cactus appears to have been recently affected by threats that completely alter or considerably modify more than a third of the species' surveyed habitat, and have caused the elimination of nearly 60 percent of documented locations. These values are supplied to serve as an extrapolation of the situation which might be taking place across the rest of the entire population. Current information regarding the status of this species must be supplemented by more precise and thorough spatial analysis through the use of geographical information systems, databases, and on-the-ground surveys.

Dispersed, patchy clusters of individuals are becoming increasingly isolated as urban development, mining, and other commercial activities continue to detrimentally impact the habitat. The remaining habitat also is subject to degradation or modification from current land management practices, increased recreational use when adjacent to urban expansion (i.e., off-road vehicle use and illegal collection), and the continuing aggressive spread of nonnative grasses into habitat. Habitat fragmentation and degradation will likely continue into the foreseeable future based on historical data and growth projections produced by the Pima County Association of Governments (1996). There is very little Federal oversight on conservation measures that would protect or recover the majority of the potential habitat. Even some areas legally protected under the ESA have been modified and may not be able to support viable populations of the Pima pineapple cactus over the long-term.

ENVIRONMENTAL BASELINE

The environmental baseline includes past and present impacts of all Federal, State, or private actions in the action area, the anticipated impacts of all proposed Federal actions in the action area that have undergone formal or early section 7 consultation, and the impact of State and private actions which are contemporaneous with the consultation process. The environmental baseline defines the current status of the species and its habitat in the action area to provide a platform from which to assess the effects of the action now under consultation.

Surveys for PPC were conducted from August 9 through September 10, 2002, by Sage Landscape Architecture and Environmental, Inc., Tucson, Arizona. Surveys were conducted within potentially suitable PPC habitat following the FWS-approved protocol. The width of the area of disturbance would not exceed 50 feet, however, a conservative, 150-foot wide corridor was surveyed around the perimeter of the Mission operation on both TON-leased lands and Mission fee lands.

The survey located 306 live PPC and 61 dead PPC within the survey area of 1,388 acres dictated by the maximum combined areas of stormwater controls and mine expansion (Sage Environmental 2002), representing a PPC density of 0.22 plants per acre that is within the normal range for the region (Mills 1991). The survey crew located 16 PPC that were either uprooted or trampled by cattle, and noted that some areas with high densities of PPC were impacted by heavy cattle grazing. Of all of the PPC located, 41% were in flower or had fruit, 45% had produced viable pups (offsets), and 27% had both pups and flowers or fruits. An unspecified number of plants were found in

bottomland areas and along stream channels, usually considered unsuitable habitat for PPC, and suggesting a tolerance for disturbance (Sage 2002).

PPC have recolonized areas within the Mission complex that had been disturbed. During surveys conducted by Dames and Moore (1997) PPC were located in the bottoms of two stormwater detention basins, constructed in 1969. Sage (2002) also found PPC within roadways, on top of a stormwater control dike, and along stream channels. This indicates that not all areas that are disturbed become unsuitable for PPC. Based on these observations, Asarco estimates that only 58.5 acres (35%) of the 165 acres to be disturbed will be permanently removed as PPC habitat.

A previous biological opinion was issued for impacts to PPC on July 27, 1998, (2-21-97-F-328) for the construction and operation of tailing impoundment No. 4 at Mission. Construction of the impoundment directly affected 309 individual PPC. Conservation measures associated with the action resulted in the establishment of an 877-acre conservation easement. This site was used for transplantation of affected PPC. Survival rates are unknown.

EFFECTS OF THE ACTION

Effects of the action refer to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated and interdependent with that action, that will be added to the environmental baseline. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are

those that have no independent utility apart from the action under consideration. Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur.

The proposed stormwater run-on and run-off controls construction and maintenance would disturb a maximum of 165 acres of potential PPC habitat. Of that, 58.5 acres will be permanently removed. The remaining acres, although disturbed during construction, will be available for PPC recolonization after construction. Although stormwater controls would not exceed 50 feet in width from the perimeter of the Mission operations, the BA assumed that any PPC within 100 feet of the facility perimeter would be affected. Accordingly, the proposed action would result in the permanent loss of 58.5 acres of habitat and the removal of up to 17 PPC. Density of cactus is calculated to be 0.10 cactus/acre. This is well within the average for the species. Densities of approximately 0.40 cacti/acre are fairly common. This would indicate that the habitat is suitable for PPC.

To compensate for the permanent loss of PPC habitat, Asarco has agreed to add 58.5 additional acres to its existing 877-acre conservation easement. In addition, PPC on Mission fee lands that will be affected by the proposed action will be transplanted to the conservation easement. Although transplant success of PPC is low, there may be a few plants that survive. Setting aside additional acreage of occupied PPC habitat, with a similar density (0.10 cactus/acre), will result in additional conservation benefits for the species. A 1:1 ratio for replacement is adequate as the average density for cactus associated with the proposed action is below the average. PPC will not be able to survive in the long-term in small, fragmented areas

surrounded by urban development. Large, contiguous blocks of habitat need to be managed for their natural values. All of the proposed conservation actions included in the biological assessment and supplement are critical to offset impacts to PPC and its habitat.

CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, tribal, local, or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

Cumulative impacts from private actions include potential future mining operations at Mission and Phelps Dodge Sierrita mines, future development activities at the Caterpillar Proving Grounds, urban development in areas around south Tucson, Green Valley, Nogales, Rio Rico, and along the Santa Cruz River. Much of this development will have little or no Federal nexus. Without any protection under the Act, the only protection available is through the Arizona Native Plant Law, which provides only for salvage for scientific and educational purposes. Regardless of salvaged PPC transplant success, the habitat would be lost.

CONCLUSION

After reviewing the current status of the PPC, the environmental baseline for the action area, the effects of the proposed action, and cumulative effects, it is the FWS's

biological opinion that the issuance of the NPDES permit for the Mission Complex, as proposed, is not likely to jeopardize the continued existence of the PPC. No critical habitat has been designated for this species, therefore, none will be affected.

The conclusions of this biological opinion are based on full implementation of the project as described in the *Description of the Proposed Action* section of this document, including any conservation measures that were incorporated into the project design.

INCIDENTAL TAKE STATEMENT

Sections 7(b)(4) and 7(o)(2) of the ESA do not apply to listed plant species. However, protection of listed plants is provided to the extent that the ESA requires a Federal permit for removal or reduction to possession of endangered plants from areas under Federal jurisdiction, or for any act that would remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any regulation of any State or in the course of any violation of a State criminal trespass law. Neither incidental take nor recovery permits are needed from FWS for implementation of the proposed action.

CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the BSA directs Federal agencies to utilize their authorities to further purposes of the ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on

listed species or critical habitat, to help implement recovery plans, or to develop information.

1) We recommend that EPA work with Asarco and FWS to expand the size of the PPC conservation area at the Mission complex.

2) We recommend that EPA work with Asarco and FWS to transplant affected PPC to the newly expanded segments of the conservation area.

3) We recommend that EPA participate on the stakeholder participation team developing the Pima pineapple cactus recovery plan and consider contributing to on-going survey efforts in Pima and Santa Cruz counties to determine the status of PPC on State lands.

4) We recommend that EPA, in cooperation with FWS, develop long-term conservation strategies for PPC and incorporate those strategies into the NPDES program.

In order that we be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, we request notification of the implementation of any conservation recommendations.

REINITIATION NOTICE

This concludes formal consultation on the proposed action. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not

considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

We appreciate the EPA's efforts to identify and minimize effects to listed species from this project. For further information please contact Mima Falk at (520) 670-4550, or Mike Martinez at (602) 242-0210 (x224). Please refer to consultation number 2-21-03-F-0014 in future correspondence concerning this project.

Sincerely,

/s/ Steven L. Spangle
Steven L. Spangle
Field Supervisor

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

OFFICE OF THE
REGIONAL ADMINISTRATOR

December 5, 2002

Jane Dee Hull
Governor
State of Arizona
1700 West Washington
Phoenix, AZ 85007

Dear Governor Hull:

I am pleased to inform you that the U.S. Environmental Protection Agency has approved the State of Arizona's application to administer the National Pollutant Discharge Elimination System program pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). Specifically, Arizona is being approved to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State except for Indian Country.

Let me congratulate you and everyone at the State on this fine effort. We look forward to continue working

closely with you on the NPDES program. If we can assist you in any way, please feel free to call.

Sincerely,

/s/ Wayne Nastri
Wayne Nastri
Regional Administrator

NOTICE OF PROPOSED ACTION
by the

U. S. Environmental Protection Agency
Region 9, WTR-5
75 Hawthorne Street
San Francisco, CA 94105

ON APPLICATION FOR APPROVAL OF THE ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

SUMMARY: The State of Arizona, by letter dated June 5, 2002, submitted a request to EPA for approval of the Arizona Pollutant Discharge Elimination System (AZPDES) Program, pursuant to Section 402 of the Clean Water Act. On July 11, 2002, EPA sent to the State its determination that the submission is complete. Under the Clean Water Act, EPA has 90 days from June 11 (i.e., the day EPA received the complete submission) to decide, whether to approve or disapprove the State's request for approval. If EPA approves the AZPDES program, the State would administer this program, which regulates the discharges of point sources to navigable waters, in place of the National Pollutant Discharge Elimination System (NPDES) program now administered by EPA in Arizona. The State is not seeking approval to regulate the disposal of sewage sludge (in accordance with section 405 of the Act and 40 CFR part 503). EPA will retain NPDES permitting authority and primary enforcement responsibility over the sewage sludge program. Arizona is planning to apply for this authority in the future. In addition, the State is not seeking approval to administer the NPDES program in Indian Country. EPA will remain responsible for implementing and enforcing the NPDES program in Indian Country.

EPA is requesting comments on the State's request and providing notice of a public hearing. EPA will either approve or disapprove the State's request after considering all comments it receives. EPA has also initiated consultations under the Endangered Species Act and National Historic Preservation Act.

PUBLIC COMMENT PERIOD: The public comment period on the State's request for approval to administer the proposed AZPDES program is currently open and will end September 16, 2002. Public comments may be in either paper or electronic format. Comments must be received or post-marked by no later than midnight on September 16, 2002. Send all paper copy comments to: Mr. Matthew Mitchell (WTR-5), Water Division, EPA Region 9, 75 Hawthorne Street, San Francisco, CA, 94105. Comments may also be submitted electronically to the following e-mail address: mitchell.matthew@epa.gov.

EPA requests that electronic comments include the commentor's [sic] postal mailing address. No Confidential Business Information (CBI) should be submitted through e-mail. Comments and data will also be accepted on disks in WordPerfect 8.0 format or ASCII file format.

If submitting comments in paper format, please submit the original and three copies of your comments and enclosures (including references). To ensure that EPA can read, understand and therefore properly respond to comments, the Agency would prefer that comments be typed or

* * *

Response To Comments Received on State of Arizona's Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program

December 5, 2002

I. Category : Public Participation in State Enforcement Process

Comment 1; Arizona Center for Law in the Public Interest

The AZPDES Appeals Process Is Not Consistent With Federal Requirements.

EPA may only approve a state's NPDES permit program that is consistent with and not less-stringent than the federal NPDES permit program. 40 C.F.R. § 123.1. Although states are free to enact provisions that are more stringent than the federal requirements, the states must meet the minimum federal requirements. Federal law requires that states administering NPDES programs shall provide for public participation in the state enforcement process by providing either of the following:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest **which is or may be adversely affected**; or
(2) Assurance that the state agency or enforcement authority will:
(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26 (b)(4);
(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a state enforcement action.

40 C.F.R. § 123.27 (d) (emphasis added). Furthermore, the judicial review available under a state's NPDES program must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30. There can be no serious dispute that the language in 49-323 (A) fails to comply with federal law.

A.R.S. § 49-323 (A) provides, in pertinent part, that an appeal may be taken "by any person who is adversely affected by the action or by any person who may with reasonable probability be adversely affected by the action and who has exercised any right to comment on the action . . . " This provision is far more restrictive than the federal standard and clearly violates the requirements of 40 C.F.R. § 123.30. This "procedure" will have a chilling effect on public participation in all aspects of the permitting process but especially the judicial review because it severely limits the right to judicial review of a permitting decision. Again, the Arizona Center for Law in the Public Interest and the Sierra Club, among others, have been raising this issue for over a year. We raised it with the Arizona Legislature, the Governor, and the Arizona Department of Environmental Quality. At this point it is evident that unless the State of Arizona is ordered to make the necessary changes by either EPA or a

court, the State will maintain the status quo of denying citizens their federally established right to judicial review of permit decisions.

Response: The regulations that set forth the State program requirements for the NPDES program contain provisions that address public participation in both state enforcement and permitting processes. These provisions set forth different requirements and standards for each of these processes. The commenter appears to be commenting on the adequacy of the State of Arizona's provisions related to public participation for both the enforcement and permitting processes.

First, in response to the comment related to public participation in enforcement actions, EPA disagrees that the State of Arizona fails to meet the standard set forth in the regulations. The regulations require that a state seeking NPDES authority provide for public participation in the state enforcement process by providing either "intervention as of right in any civil or administrative action to obtain remedies specified in [40 C.F.R. § 123.27(a)(1), (2), or (3)] by any citizen having an interest which is or may be adversely affected; or" provide assurance that it will meet an alternate test of public participation. As explained in detail below, EPA believes that Arizona meets the public participation requirement by providing intervention as of right in civil actions to obtain the remedies specified in 40 C.F.R. § 123.27(a)(1), (2) and (3).

As the commenter notes, 40 C.F.R. § 123.27(a) requires a state seeking authority to administer the NPDES program to have certain enforcement authorities. Specifically, it requires that the State have authority to: (1) restrain

immediately and effectively any person by order or by suit from engaging in activity which is endangering or causing damage to public health or the environment; (2) sue to enjoin any threatened or continuing violation of NPDES requirements; and (3) to assess civil and criminal penalties for violations of NPDES requirements. The State of Arizona meets the requirements of 40 C.F.R. § 123.27(a)(1), (2), and (3) by having the authority to file a civil action to: (1) immediately and effectively restrain a person[1]; (2) enjoin any threatened or continuing violation of any NPDES program requirement; and (3) recover civil and criminal penalties.[2]

Public participation in all of the civil actions described above, is governed by Rule 24 of the Arizona Rules of Civil Procedure. Specifically, Rule 24 (a)(2) of the Arizona Rules of Civil Procedure allows intervention as of right upon timely application "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.*" (Emphasis added). This provision is identical to Rule 24 (a)(2) of the Federal Rules of Civil Procedure.

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[1] While the State has authority to issue an administrative compliance order, it can be appealed and does not become final until after a decision on the appeal. Accordingly, ADEQ must file a judicial action to "immediately and effectively" restrain a person from engaging in activity which is endangering or causing damage to public health or the environment.

[2] The State does not have administrative authority to assess civil or criminal penalties.

In its "NPDES State Program Guidance," July 1986, EPA notes that in addition to the two options set forth in 40 C.F.R. § 123.27(d), there is a third option available to States. Specifically, EPA provides "a State may allow intervention through a rule analogous to Rule 24(a)(2) of the Federal Rules of Civil Procedure and provide an assurance by the appropriate State enforcement authority that it will not oppose intervention under the State analogue on the ground that the applicant's interest is adequately represented by the State." For purposes of AZPDES enforcement, ADEQ is the principal enforcement authority, and it recently provided an assurance "that it will not oppose intervention under the State analogue on the ground that the applicant's interest is adequately represented by the State" in an addendum to the Memorandum of Agreement (MOA) with EPA Region 9.[3]

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[3] According to the Attorney General, State law provides the Director with enforcement discretion, *e.g.*, "the director, through the attorney general, *may* request a temporary restraining order, a preliminary injunction, a permanent injunction or any *other relief necessary* to protect the public health. . . . " A.R.S. §49-262 (A) (emphasis added); "the attorney general may, and at the request of the director shall, commence an action in superior court to recover civil penalties [for violations of, *inter alia,* AZPDES rules or permits]. A.R.S. §49-262 (C). Further, as explained in the Attorney General's Statement, the Arizona Supreme Court has stated that the exercise of a discretionary power "is wholly within the function of the administrative body except that it may not abuse its discretion." *Arizona State Highway Commission v. Superior Court of Maricopa County,* 81 Ariz. 74, 299 P.2d 783, 785 (Ariz. 1956) (citation omitted). Thus, according to the Attorney General, ADEQ is authorized to exercise its enforcement discretion by agreeing not to oppose intervention under Civil Procedure Rule 24 (a)(2) on the ground that an applicant's interest in an AZPDES enforcement action is adequately represented by the State. The Attorney General's Statement also states that the same principle would apply in the event the Attorney General undertook an independent

(Continued on following page)

Therefore, EPA believes that the State of Arizona meets the requirements of 40 C.F.R. § 123.27(d).

Second, EPA disagrees with the commenter that the State of Arizona fails to meet the regulations that address public participation in the State permitting process. As the commenter notes, the regulations that address judicial review of approval or denial of permits available under a state's NPDES program requires that the state procedures must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30.

The standard that applies to judicial review in federal court of a federally-issued permit is set forth in Section 509(b)(1) of the CWA which provides in pertinent part:

> Review of the Administrator's action . . . (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. . . .

As explained in the Attorney General's Statement, Arizona law provides an opportunity for judicial review in state

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action not requested by the Director to seek civil penalties under A.R.S. §49-262 (C) or injunctive relief under § 49-262 (B).

court of the final approval or denial of permits by: (1) the permittee or permit applicant; (2) any person who was a party to the administrative appeal of the final permit action; and (3) person who can demonstrate an interest that qualifies the person to intervene in the action. Further, the Attorney General explains in her statement that "any interested person may intervene in the administrative appeal as a matter of right, in addition to the right of appeal granted to any person who is or may with reasonable probability be adversely affected by the permit action." Finally, parties to a proceeding before an administrative agency may seek judicial review by filing a complaint within 35 days after being served with a copy of the administrative decision. Therefore, EPA believes that the State of Arizona meets the requirements of 40 C.F.R. § 123.30, which sets forth the standards for "Judicial review of approval or denial of permits."

II. Category: Funding of the AZPDES Program

Comment 1; Arizona Center for Law in the Public Interest

The State Of Arizona Cannot Adequately Fund The AZPDES Program. Pursuant to the Clean Water Act, the state seeking delegation must have adequate authority to administer the NPDES program. 33 U.S.C. § 1342(b). In the present case, Arizona lacks the authority because the program has no funding mechanism whatsoever. It is our understanding that EPA is providing the majority of the funding for the AZPDES program. Without EPA funding, it is apparent that the State would be unable to support the AZPDES program thereby forcing EPA to withdraw delegation. In addition to the State's ongoing budget crisis, the State has assured that the AZPDES program would not be self-supporting by prohibiting itself from instituting

any type of permit fee. A.R.S. § 49-255.01 (J) states that " . . . The Department shall not charge a fee to issue, deny, modify, suspend or revoke a permit under this Article or to process permit applications." Permit fees are a widely-used for obtaining additional funding for such programs air both state and federal levels. See e.g., Cal. Water Code § 13260 (establishing annual fees). It is our understanding that the State made the decision to not implement permit fees in order to gain support for the primacy process from the regulated community. However, this compromise will likely cost Arizona the NPDES program because after EPA funds are terminated, Arizona will most likely be unable to fund the program as it is currently defined.

Response: According to the AZPDES Program Description (page 5), federal funding makes up approximately 40% and state funding makes up 60% of the AZPDES program funding. EPA believes that the Arizona Legislature has indicated a commitment to fund the AZPDES program through its funding of nine positions for the AZPDES program for FY2002 and FY2003 before the program was authorized. In addition, during recent budget negotiations, the Arizona Governor ensured that the funding for these AZPDES positions stayed intact. Any government program, state or federal, is subject to the uncertainties of the budget process in the future. EPA believes that the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

III. Category: Laboratory Analytical Capabilities

Comment : Navajo Nation

Program Description, Page 2, *III. Organization and Structure:* There is a lack of discussion concerning the

laboratory analytical capability to be utilized by the AZPDES Program for compliance and enforcement purposes. It is well understood that the State of Arizona operates an excellent analytical laboratory that will likely be utilized by the AZPDES Program.

Response: ADEQ has verified that when ADEQ staff take effluent samples, ADEQ staff will send the samples to the Arizona Department of Health Services (ADHS) laboratory for analysis unless the laboratory does not have the equipment or capability to perform the necessary analysis. In that case, ADEQ will utilize an ADHS certified contract laboratory.

IV. Category: Preservation of Historic Properties

Comment I: Inter-Tribal Council of Arizona

While the State does not authorize or administer the NPDES program in Indian Country, the regulation of discharges could pose the potential threat to lands and historic sites in Indian Country. In addition, the proposed MOA [Memorandum of Agreement] between the State of Arizona and EPA does not deal effectively with possible adverse impacts to historic properties that are located outside of Indian reservation lands. These include archeological sites, burial grounds, traditional cultural properties and other sites considered to have national importance to the Tribes that are now afforded some consideration for protection under the NHPA. The NHPA provides that the American Indian tribal governments shall be consulted on projects or undertakings that may impact properties listed on or eligible for inclusion on the National Registry for Historic Places that are located on any lands within the State of Arizona.

Response: EPA believes that historic properties, including tribal historic resources located both in and out of Indian Country within the State of Arizona, will be protected under the AZPDES program. Under State law, ADEQ is required to provide notice of all proposed AZPDES permits to a number of parties, including affected tribes and the State Historic Preservation Officer (SHPO). This notification will provide parties with an opportunity to comment on proposed permits. In addition, under a separate Memorandum of Understanding (MOU), ADEQ and the SHPO's Office have agreed to procedures that, among other things, further specify the coordination they will undertake should the SHPO believe that a proposed permitting action may have an adverse effect on historic properties. The MOU also commits ADEQ to ensure that permits comply with applicable laws to provide the maximum protection of historic properties and to seek ways to avoid, minimize or mitigate any adverse effects to such properties. Further, their MOU provides that if the two agencies are unable to resolve the issues identified by the SHPO, the SHPO will notify EPA for appropriate consideration under EPA's Clean Water Act oversight of the program. Therefore, under the AZPDES program, potential effects of ADEQ permitting actions on historic properties will be considered and addressed as part of the permitting process.

Additionally, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that arise under the AZPDES program which may affect Tribes, including issues related to permits that may have a potential adverse effect on tribal historic properties. Finally, as recognized in the MOA between EPA and ADEQ, EPA retains the authority under the CWA to object

to AZPDES permits that do not meet applicable CWA requirements, and if the objections are not resolved, to issue the permits itself. Accordingly, should a proposed AZPDES permit having a potential adverse effect on tribal resources result in a violation of applicable CWA requirements, EPA will have the authority, consistent with the CWA, to object to its issuance.

Comment 2; Inter-Tribal Council of Arizona

The present language of the MOA between EPA and ADEQ is not in accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), Executive Order 13175, and 512 DM 2. The following language is suggested: "Meaningful consultation with the Tribes shall be adhered to by ADEQ on requested permits and permit modifications for projects, programs, and activities on Federal and State lands carried out under the auspices of this MOA that have a potential adverse effect on tribal historic properties."

The identification and evaluation of historic properties, assessment of effects and consultation procedures are outlined under rules and regulations promulgated for section 106 of the National Historic Preservation Act (16 U.S.C. § 470f). It should be noted that the permitting process in itself triggers a Section 106 review process with the requirement for tribal consultation.

Response: EPA will continue to consult with Tribes, consistent with the federal trust responsibility, on matters that arise under the AZPDES program which may affect Tribes, including permit issues that may have a potential adverse effect on tribal historic properties, whether or not

located in Indian Country. Therefore, EPA believes that an amendment to the MOA between EPA and ADEQ is not necessary.

Comment 3; Inter-Tribal Council of Arizona

In addition to consultation requirements, ITCA requests that the MOA between EPA and ADEQ be amended to include the following language, "The potential effects of a permitted project on federally recognized Indian tribes and their historic properties and culturally important sites located outside of Indian reservation lands be evaluated and determined such that there are no detrimental effects to traditional cultural places, waters, or historic sites before a NPDES permit is issued."

Response: For the reasons set forth in response to Comment 1 in Category IV above, EPA believes that an amendment to the MOA between EPA and ADEQ is not necessary.

Comment 4; Inter-Tribal Council of Arizona

The current draft MOA adequately addresses the responsibility of EPA to implement and enforce the NPDES program within present day American Indian reservation boundaries. But it should include provisions whereby EPA consults with Indian tribes to insure that no adverse effects to tribal lands and to culturally important sites outside of Indian reservation lands occur if or when any NPDES permit be issued by either EPA or ADEQ.

Response: As explained in response to Comment 1 in Category IV above, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on

matters that may affect Tribes after approval of the AZPDES program. Such consultation may address matters that may impact lands and culturally important sites both within the boundaries of Indian country and outside such boundaries. Therefore, EPA believes that an amendment to the MOA is not necessary.

Comment 5; Bruce Nigel

Analysis of the authorization request indicates that zero protection of historic properties will be granted by the state should that government issue its own permits. Currently, under the NPDES program an authorization to discharge under a NPDES permit requires that historic properties not be adversely impacted by the activities authorized by the permit. According to federal law, a Clean Water Act permit may not be issued if the resultant (sic) of the permit will be the destruction of historic property. In Arizona, without such protection, developers will be encouraged to grade their property without thought of protecting or cataloging irreplaceable historic artifacts. The "encouragement" is manifest by the fact that without historic property protection, developers will experience cost savings by not expending any money on preserving those artifacts.

Response: EPA disagrees with this comment. As explained above in response to Comment 1 in Category IV above, EPA believes that historic properties, including tribal historic and cultural resources located both in and out of Indian Country within the State of Arizona, will be provided protection under the AZPDES program. In addition, EPA believes this comment misstates the effect of federal law. Where applicable, federal law, such as the

NHPA, generally imposes only procedures to evaluate potential impacts of and possible alternatives for proposed permits which may adversely impact historic resources. As described in detail above, EPA believes that procedural safeguards remain under the AZPDES program. Accordingly, EPA disagrees that developers will be encouraged to destroy historic and cultural resources under the AZPDES program.

Comment 6; Bruce Nigel

The Arizona delegation proposal does not make even the smallest token attempt at allowing the native American communities any input into the issuance of NPDES authorizations. Under Arizona's proposal, a permitted activity adjacent to native American tribal lands could cause the ruin of valuable artifacts on the land before the tribal government was even aware the activity was authorized. The program proposed by the state will allow thousands of authorizations without any public notice of the development. On the vast majority of developable lands the historical significance is yet to be determined. Therefore, in the best interest of Environmental Justice and preserving the archeological and cultural history of the citizens of Arizona, the delegation for authorization should be rejected.

Response: EPA believes that Tribes will continue to play an important role in ensuring that historic and cultural resources are protected under the AZPDES program. Specifically, the AZPDES regulations require ADEQ to provide notice of a proposed permit to a number of persons, including affected tribes and the SHPO's Office. This notification, among other things, will provide parties

with an opportunity to comment on proposed permits. Therefore, Tribes will have an opportunity to provide input to ADEQ on potential adverse effects on tribal cultural and historical resources. In addition, as set forth in Response to Category IV Comment 1 above, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that arise under the AZPDES program which may affect Tribes, including issues relating to permits that may have a potential adverse effect on tribal historic properties. Therefore, Tribes also may raise concerns related to proposed AZPDES permits as part of the government-to-government consultation process. Accordingly, EPA believes that Tribes will continue to have opportunities for input on proposed permits administered under the AZPDES program.

In addition, the CWA requires EPA to approve submissions from States seeking approval to administer the NPDES program, unless EPA determines that the submission fails to meet the statutory criteria set forth in Section 402(b). Accordingly, EPA does not have the authority to deny a State's application to administer the NPDES program based only on a finding that it would be "in the best interest of Environmental Justice and preserving the archeological and cultural history of the citizens of Arizona."

Comment 7; The Navajo Nation

The public notice for the AZPDES program submission that appeared in the Federal Register (August 1, 2002, Volume 67, Number 148, Page 49916-49920) states that "EPA will not make a final decision on AZPDES program approval until after: . . . (2) completion of the ongoing

consultations with the U.S. Fish and Wildlife Service on effects program approval may have on endangered or threatened species and their designated critical habitat; and (3) completion of ongoing consultations with the State Historic Preservation Officer on effects program approval may have on historic properties or sites listed or eligible for listing in the National Register of Historic Places." No documents comprising the AZPDES program submission discuss the AZPDES permit review procedures involving potential effects on endangered or threatened species and their designated critical habitats and historic properties or sites.

In the Navajo Nation's development of its own NPDES program submission, Navajo EPA participated in extensive work (meetings, correspondences, teleconferences, etc.) starting in 1995 with the U.S. Fish and Wildlife Service, the New Mexico State Historic Preservation Officer (SHPO), and the Advisory Council for Historic Preservation (ACHP). Navajo EPA subsequently reached closure with ACHP concerning NPDES permit actions and historic properties and sites. For NPDES permit actions and endangered or threatened species and their designated critical habitats, EPA opted to progress toward the use of its proposed "national MOA" with the U.S. Fish and Wildlife Service. The intent was to have the "NPDES MOA Between the Navajo Nation and the U.S. Environmental Protection Agency Region 9" spell out how Navajo EPA see to it that NPDES permit actions have no effect on endangered or threatened species and their designated critical habitat and on the preservation of historic properties. EPA's public notice of the AZPDES program submission without consultations completed with the U.S. Fish and Wildlife Service and the SHPO or

without any ESA and NHPA discussion in permitting procedures gives the impression that EPA is utilizing a different (abbreviated) NPDES program approval format for the State of Arizona.

Response: Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), the Agency consults with the appropriate SHPO and/or Tribal Historic Preservation Officer on federal undertakings that have the potential to affect historic properties listed or eligible for listing in the National Register of Historic Places. Accordingly, on July 25, 2002, EPA initiated discussions with the State of Arizona's SHPO on the State's application to administer the NPDES program. Among other things, EPA and the SHPO discussed the issue of coordinating with Tribes on the AZPDES application. Following on this discussion, on August 9th, 2002, EPA sent a letter to each of the 23 Tribal Governments located within the State. EPA sent this letter to ensure each Tribe had notice of, and an opportunity to provide input on, Arizona's application, and to outline the AZPDES application and the process EPA would follow to review the application.

On August 23, 2002, EPA provided the Arizona SHPO's Office with EPA's determination that approval of Arizona's application would have no effect on historic properties in Arizona. As part of the coordination process, the SHPO's Office raised certain issues regarding approval of the Arizona program for further discussions. By letter dated

September 23, 2002, the SHPO withdrew these issues for consideration and informed EPA that it was working with ADEQ to coordinate its activities in the protection of Arizona's cultural resources. On October 18, 2002, the SHPO and ADEQ entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive notices of certain proposed permit actions. This MOU further provides for coordination between ADEQ and the SHPO to resolve any identified issues to ensure that AZPDES permits will comply with Arizona water quality standards and Arizona laws protecting historic properties. For those permits with the potential to adversely affect historic properties, ADEQ and the SHPO agreed to seek ways to avoid, minimize or mitigate any adverse effects to historic properties stemming from the proposed permit. EPA believes that the agreement between ADEQ and the SHPO is consistent with EPA's determination that approval of the State permitting program would have no effect on historic properties.

See also response to Comment 12 in Category XII below for EPA's response to comment pertaining to Endangered Species.

Comment 8; Arizona Chamber of Commerce

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be

required to consult with SHPO. However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits (*e.g.*, CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. *See* A.R.S. § 41-865. Violation of this state statute is a criminal offense. *See* A.R.S. § 41-865(G)&(H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of the current process.

EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

Comment 9; Home Builders Association of Central Arizona

Identical to Comment 8.

Comment 10; Withey, Anderson & Morris

Identical to Comment 8.

Comment 11; Diamond Ventures Inc.

The protection of historic properties is not a significant concern of the approval of the AZPDES program in that, like the Endangered Species Act, ADEQ is not required to consult with the State Historic Preservation Office (SHPO) (in accordance with Section 106 of the National Historic Preservation Act.) In the same manner as stated above, the AZPDES program is designed consistent with the programs in place with the vast majority of states relative to the National Historic Preservation Act.

Response to Comments 8, 9, 10, and 11: Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. As discussed above in response to Comment 7 in Category IV above, EPA coordinated with the Arizona SHPO regarding EPA's potential approval of the AZPDES program. In addition, EPA agrees with the commenters that historic properties will be provided protections under the AZPDES program. Specifically, as explained above, under both State law and a MOU between ADEQ and SHPO's Office, procedures are laid out to ensure that permits comply with applicable laws to provide the maximum protection of historic properties and that ADEQ will seek ways to avoid, minimize or mitigate any adverse effects to such properties. Finally, consistent with the federal trust responsibility, EPA will continue to consult

with Tribes on matters that arise under the AZPDES program which may affect Tribes, including permit issues that may have a potential adverse effect on tribal historic properties.

V. Category: International Wastewater Treatment Plant

Comment 1; Arizona Center for Law in the Public Interest

International Wastewater Treatment Plants Must Remain Under EPA's Authority. EPA should retain authority for regulating all NPDES permits for international wastewater treatment plants, and specifically, the Nogales International Wastewater Treatment Plant. EPA is an important part of the process towards repairing the Nogales Plant and it is imperative that EPA remain the regulator of that facility.

Response: EPA believes that the provisions for retaining authority for permits that are subject to EPA enforcement action or under appeal in Sections III.C.2. and C.3 of the Memorandum of Agreement between EPA Region 9 and ADEQ are appropriate. The permit for the Nogales International Wastewater Treatment Plant (NIWTP) was issued in 2001 and is not under appeal and the facility is not subject to a current EPA enforcement action. EPA has worked with ADEQ's Border Office and Water Permits Section staff on the NIWTP permit, thus ADEQ staff is familiar with the permitting circumstances. EPA does not believe it is appropriate to retain authority over this permittee and will rely on its oversight role.

VI. Category: Deferral of Sewage Sludge Authorization

Comment; Pima County Wastewater Management

Pima County Wastewater Management (PCWWM) holds NPDES permits for discharges from its wastewater treatment plants which contain permit provisions regulating the disposal of sewage sludge. PCWWM requests that EPA in a response to comments explain how these types of already issued permits, which contain regulatory program elements that may be delegated as well as program elements that will not be delegated, will be jointly administered by EPA and ADEQ. PCWWM specifically requests that EPA explain how these permits will be administered in relation to drafting permit changes, providing public notice, issuing, authorizing, denying, reissuing, suspending, revoking, receiving reports, enforcement, and performing facility inspections. PCWWM also asks that EPA clarify the process that must be used to make application for obtaining a new permit where both delegated and non delegated program elements must be included within an application.

Response: EPA is approving ADEQ's program to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State, except for in Indian country. However, as the commenter states, EPA will continue to administer the sewage sludge regulatory program in Arizona, in accordance with 40 C.F.R. part 503. EPA will oversee the program through review of draft and/or proposed permits for all major facilities including the sewage sludge management portions in addition to taking enforcement actions for violations of 40 C.F.R. part 503. Furthermore, EPA will administer and enforce those

portions components of the federal sludge management program that are "self-implementing," i.e., which are directly applicable to entities not subject to NPDES permits, such as sludge haulers, land applicators, etc. ADEQ does yet not have EPA approval for its own sludge management program that would allow it to administer and enforce these components under the CWA.

Nevertheless, ADEQ will have certain responsibilities for sewage sludge use and disposal requirements imposed and implemented through NPDES permits. In order for EPA to approve Arizona's NPDES program, the State was required to have authority to impose standards for sewage sludge use and disposal in NPDES permits that are equivalent to federal standards adopted pursuant to Section 405 (d) of the CWA. (40 C.F.R. § 122.44(b)(2).) Arizona has demonstrated that it has such authority, which it will fully exercise in issuing AZPDES permits. This includes the authority to draft permit changes, provide public notice, issue, authorize, deny, reissue, suspend, revoke, receive reports, enforce, and inspect based on that authority. Thus, permittees that have either an NPDES or AZPDES permit with sewage sludge conditions should submit applications for permit renewal to ADEQ.

Because of the federal and state laws, preparers are required to submit annual reports to EPA and ADEQ.

ADEQ has informed EPA that it has revised and sent its formal application for approval of its sludge management program. The period of time during which EPA retains regulatory authority for the sewage sludge management program while ADEQ implements biosolids requirements in permits may thus be only a matter of a few months.

VII. Category: Continuing Planning Process

Comment: Navajo Nation

Program Description, Page 2, 7th paragraph, *III. Organization and Structure:* According to 40 C.F.R. § 123.25(b), "State NPDES programs shall have an approved continuing planning process under 40 C.F.R. § 130.5 and shall assure that the approved planning process is at all times consistent with the CWA." The program description in the AZPDES program submission refers to a " . . . continuing planning process submission of 1993 or more recent additions sent to EPA." Has the 1993 or any recent addition of Arizona's continuing planning process been received and approved by EPA for consistency with the CWA? The Navajo Nation submitted its initial continuing planning process in 1996 but has since made required changes to its process document.

Response: EPA approved Arizona's Continuing Planning Process (CPP) submitted in 1993.

VIII. Category: Jurisdiction for Private Lands within Boundaries of Navajo Reservation

Comment; Navajo Nation

Program Description, Page 1, 2nd paragraph, *II. Scope of the Program:* The State of Arizona intends to apply its rules of the NPDES program " . . . to discharges that are within Arizona, but not in 'Indian Country'. . . ." For the Navajo Nation, there are several facilities located on private lands ("islands") within the exterior boundaries of the Navajo reservation (i.e., Cameron, Sanders, etc.) that may lead to misunderstandings on who possesses actual NPDES program authority. It is the full understanding of

Navajo EPA that these islands are subject to tribal jurisdiction.

Response: EPA has approved the State of Arizona to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State, except for in Indian country. EPA retains authority to issue permits, and will continue to be the permitting agency, for any facility in Indian country, including facilities located on private lands within the exterior boundaries of reservations.

IX. Category: Request for Public Comment Extension

Comment; Bruce Nigel

Finally, due to the complexity of the issues surrounding the proposed delegation agreement and the blatant inadequacy of environmental protection proposed by ADEQ, it is requested that the period of public comment be extended until 31 October 2002 at earliest. This will allow those whose resources are seriously limited in comparison to the vested interests, who stand to profit from the proposed delegation (e.g., mining construction, and timber industries), to continue to investigate and submit cogent comments on the proposed delegation.

Response: Under Section 402(b) of the Clean Water Act, States may apply to EPA to administer the NPDES program. EPA must approve a State's application unless EPA determines that the State program fails to meet certain specified statutory requirements. Further, the statute provides that not later than ninety days after the date on which a State submits an application to

administer the NPDES program, EPA's authority to issue permits in that State is suspended, unless EPA disapproves the State's application. In making its best effort to meet this deadline, EPA must, among other things, consider, summarize and respond to significant public comments received on the State's application.

EPA takes very seriously its responsibility to provide the public with the opportunity to meaningfully participate in the decision making processes. In this instance, EPA must balance this with its responsibility to make a concerted effort to meet the statutory deadline. After weighing these responsibilities and reviewing its public participation efforts, EPA believes that the forty-five day public comment period that was afforded on this matter provided the public with an opportunity to meaningfully participate. Accordingly, EPA is denying the request for an extension.

X. Category: Ocean Discharge Criteria Pursuant to Section 403 of the CWA

Comment: Navajo Nation

Statement of the Attorney General, Page 5, *3. Authority to Apply Federal Standards and Requirements to Direct Discharges:* The State of Arizona Attorney General verifies that State laws provide authority to apply applicable federal effluent standards and limitations including "Ocean discharge criteria pursuant to Section 403 of the CWA." Section 403 applies to " . . . the territorial sea, the waters of the contiguous zone, or the ocean. . . ." Are there such waters in the State of Arizona?

Response: There are no such waters. The language cited in this comment is the language from the Clean Water Act.

As explained on page 6 of the Attorney General Statement under *Remarks of the Attorney General*: " . . . Since Arizona has no ocean boundary, we would not interpret the statutory authority to mandate the application of useless standards or criteria; thus, the adopted rules do not provide for ocean discharge criteria per CWA § 403."

XI. Category: Stringency of State NPDES Regulatory Authority

Comment; Bruce Nigel

For the reason stated below EPA should reject the authorization request.

The Code of Federal Regulations at Section 122.44 (d) allows, water quality standards and State requirements more "stringent than . . . [the] Clean Water Act [CWA] . . . to achieve water quality standards established under section 303 of the CWA."

The State legislative authority allowing the ADEQ authorization for the NPDES program, HB 2426, explicitly disallows any NPDES regulatory authority to be more stringent than the CWA.

This is clearly a conflict. The citizens of Arizona deserve the environmental protection that would be offered to them by regulations more stringent than the CWA. Further, a state government may not rescind the rights given to its citizens by Congress. The citizens of Arizona should not be forced to accept anything less than the full environmental protection offered by the CWA. Anything less than full protection would violate the "equal protection" clause of the Constitution.

The rejection of Arizona's request to administer the NPDES program is required. Accordingly, EPA should reject the Arizona application to be authorized for the NPDES protection.

The intent of this comment is to request that EPA deny Arizona's application for NPDES permit issuing authority.

Response: EPA disagrees with the comment. HB 2426 requires ADEQ to adopt by rule, a permit program that is consistent with, but no more stringent than, the requirements of the Clean Water Act for the point source discharge of any pollutant or combination of pollutants into navigable waters. 40 C.F.R. § 122.44(d) requires that, under certain conditions, NPDES permits include requirements in addition to, or more stringent than, promulgated effluent guidelines under sections 301, 304, 306, 307, 318, and 405 of the CWA. The Attorney General of the State of Arizona has certified that in her opinion the laws of the State provide adequate authority to carry out the NPDES program. The Attorney General states that A.R.S. § 49-203(A) (which codifies HB 2426) authorizes the Director of ADEQ to adopt rules and include permit provisions consistent with the requirements of the Clean Water Act. In addition to noting that ADEQ has incorporated by reference 40 C.F.R. § 122.44(d), the Attorney General concludes in her statement that ADEQ has the authority among other things to establish permit conditions, discharge limitations and standards of performance, including case by case effluent limitations. Therefore, EPA believes that ADEQ has the requisite authority to include permit conditions that are in addition in to or more stringent than promulgated effluent limitation guidelines or standards.

XII. Category: Endangered Species

Comment 1; Arizona Center for Law in the Public Interest

EPA Must Complete Formal Section 7 Consultation Prior To Any Decision Approving AZPDES Program.

Every federal agency must, "in consultation with and with the assistance of the [U.S. Fish and Wildlife Service], insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . " Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). In furtherance of these obligations, each federal agency is required to complete formal section 7 consultation with the U.S. Fish and Wildlife Service ("FWS") whenever an agency undertakes an action that "may affect listed species or critical habitat," unless the FWS determines "that the proposed action is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(a)-(b). "Effects" of an action include " . . . the direct and indirect effects of the action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action . . . " 50 C.F.R. § 402.02. Furthermore, once the section 7 consultation has been initiated, the consulting federal agency is prohibited from making any "irreversible or irretrievable commitment of resources with respect to the agency action . . . " 16 U.S.C. § 1536(d).

There is no doubt that EPA's consideration and approval of the AZPDES program is an action mandating formal consultation under section 7 of the ESA. Indeed, EPA has acknowledged that approval of the AZPDES program may

affect numerous federally-listed species and designated critical habitats in Arizona and therefore, EPA requested initiation of formal consultation with FWS. [See Letter from Terry Oda to David Harlow dated June 21, 2002] However, formal section 7 consultation must be *completed* prior to any decision by EPA regarding the AZPDES program.

Response: EPA completed formal consultation with the U.S. Fish and Wildlife Service (FWS or Service) under section 7 of the Endangered Species Act (ESA), and considered the biological opinion of the Service, prior to making its determination to approve the AZPDES program.

Comment 2; Arizona Center for Law in the Public Interest

EPA Has Failed to Initiate Formal Section 7 Consultation.

Notwithstanding EPA's acknowledgment that it has a duty to formally consult with FWS regarding the AZPDES program, EPA has not yet properly initiated formal section 7 consultation. On August 20, 2002, FWS properly rejected EPA's request to initiate formal consultation based on EPA's failure to provide FWS with the basic information necessary, and required by law, for preparation of a Biological Opinion ("BO"). [See Letter from Brian Hanson to Terry Oda dated August 20, 2002 (hereafter referred to as "August 20th Letter".] The ESA and its implementing regulations require that written requests to initiate formal consultation must include, among other information, a "description of the specific area that may be affected by the action," and a "description of the manner in which the

action may affect any listed species or critical habitat and an analysis of any cumulative effects." 50 CFR 402.14(c)(2,4). As noted in the August 20th Letter, EPA failed to meet these minimum requirements. [See August 20th Letter stating, "We will initiate formal consultation on the AZPDES program as soon as we receive the information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14)."] Indeed, EPA's Biological Evaluation for Endangered Species Act Consultation on USEPA's Proposed Approval of the State of Arizona's NPDES Program, dated June 21, 2002, (hereafter referred to as "EPA's BE") is woefully deficient in several respects.

For example, EPA's BE fails to adequately assess the manner in which approval of the AZPDES program may affect listed species or critical habitat in Arizona. EPA asserts that "[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 process for consultation *will no longer apply.*" [EPA's BE at 15 (emphasis added)] The procedural and substantive requirements of section 7 of the ESA are among the most fundamental and important protections afforded to listed species and critical habitat under the ESA. There is no question that NPDES permitting decisions have in the past and will, in the future, result in substantial negative impacts to listed species and critical habitat. Terminating section 7 consultations on NPDES permitting actions in Arizona will have monumental impacts on listed species and critical habitat. Yet, EPA's BE fails to analyze these likely impacts whatsoever. Indeed, EPA's BE fails to analyze the impacts of this action for even one of the 60 federally-listed species that EPA identified as likely to be affected. Instead, EPA simply

concludes that "any potential adverse effects to Federally-listed species or critical habitat" resulting from transfer of NPDES permitting authority to Arizona "would be insignificant and/or discountable." EPA's BE at 16. This conclusion is not only legally defective on its face – there is no "insignificant and/or discountable" exception for adverse effects under the ESA – but is completely unsupported by any meaningful analysis.

EPA's BE is also legally deficient because it fails to undertake any analysis of cumulative effects as required by the ESA. ESA implementing regulations define "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. If the AZPDES program is approved by EPA, there is an absolute certainty that in the future, hundreds of state NPDES permits will be issued annually with the potential of causing substantial negative impacts to listed species and critical habitat. Yet, EPA's BE contains no discussion, let alone analysis, of even basic information essential to accurately assess these cumulative effects including, for example, how many NPDES permits are likely to be issued by the State of Arizona on an annual basis, what specific species and critical habitats are likely to be impacted by such permits, and how the specific species or critical habitat may be affected.

Response: EPA disagrees with the commenter. EPA believes that it has met all the requirements of ESA section 7 with respect to its proposed approval of the AZPDES program, including initiating section 7 consultation and providing appropriate information to the FWS to conduct an ESA section 7 consultation. As

indicated above, EPA and the FWS have completed the formal section 7 consultation process.

In requesting ESA section 7 consultation, EPA prepared a biological evaluation (BE) and provided information to the FWS that met the requirements of the ESA, including, among other things, a description of the area that may be affected by the action, a description of the manner in which EPA's action may affect any Federally-listed threatened or endangered species (listed species) or their designated critical habitat, and an analysis of any cumulative effects, as demonstrated in its June 21, 2002 submittal and EPA's follow-up letter to the FWS dated August 22, 2002 explaining how its June 21 submittal provided the necessary information.

First, EPA provided a description of the area and species that might be affected by the action. Part VII of the BE states (and EPA's August 22, 2002 letter reiterates), "As the location of future discharges cannot be anticipated, for purposes of this BE, the USEPA has determined that all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters may be affected by this action." A list of such species was provided in Appendix C to the BE. EPA also provided to the FWS by attachment to the August 22 letter a list of all NPDES permits authorized in the State of Arizona (excluding NPDES permits in Indian country) and, for each such permit, the facility address and the name of the receiving water if available.

Second, while the commenter may disagree with the analysis and conclusions in EPA's BE, the BE and EPA's August 22 letter clearly and adequately analyze effects of EPA's proposed approval action on listed species and

critical habitat, and explain the basis for EPA's conclusions about such effects. Among other things, the continuing requirements of the CWA, the requirements of the AZPDES program, and EPA's oversight of the AZPDES program will provide ongoing protection to listed species and critical habitat in Arizona following EPA's approval of the AZPDES program. For example, as discussed in detail in the BE, EPA and the FWS have signed a Memorandum of Agreement describing the manner in which EPA and the FWS will work together to ensure that States administering the NPDES program protect listed endangered and threatened species. *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* dated February 22, 2001 (National MOA). In the National MOA, EPA has agreed to utilize its oversight authority in a specific manner to protect listed species and critical habitat. Implementation of the MOA procedures will ensure, among other things, that the FWS has an opportunity to review and comment on draft AZPDES permits and work with ADEQ and EPA to address potential effects to listed species and critical habitat associated with the permits. As indicated in the BE, EPA is committed to following the procedures in the National MOA to continue to ensure the protection of listed species after our approval of the AZPDES program. As explained in detail in the BE, in light of these continuing protections, EPA concluded that its proposed approval action would be insignificant and discountable and therefore its approval

action was not likely to adversely affect listed species or critical habitat.[4]

Third, EPA's biological evaluation included an appropriate level of description and analysis of cumulative effects. EPA's BE explained that loss and degradation of habitat continues to occur in Arizona through home development on private land, commercial development, and other methods, that State lands continue to experience different actions such as mining, livestock grazing, recreational use that diminish the quality and quantity of habitat, and that these actions are not likely to decrease or cease in the future.

Fourth, to ensure that FWS had the benefit of reviewing information pertaining to endangered species presented by other parties interested in EPA's proposed program approval, EPA forwarded to FWS, by letters dated October 15, 2002 and October 25, 2002, all ESA-related comments received during the public comment period on EPA's proposed approval of the AZPDES program. Thus, the FWS considered the information in those comments during the consultation.

Last, EPA agrees with the commenter that ESA section 7 does not apply to State permitting actions, but disagrees

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[4] EPA notes that its determination that its proposed approval action was not likely to adversely affect listed species or critical habitat was appropriate in light of its finding that any effects would be insignificant or discountable. FWS has determined that an action is not likely to adversely affect listed species where effects on species are insignificant or discountable. See, e.g., *Endangered Species Consultation Handbook, Procedures for Conducting Section 7 Consultations and Conferences,* U.S. Fish and Wildlife Service and National Marine Fisheries Service, March 1998, at pp. xv-xvi, 3-12.

that EPA's approval action will result in monumental impacts on listed species and critical habitat. EPA notes that on December 3, 2002, FWS issued a biological opinion concluding that EPA's proposed approval of the AZPDES program is not likely to jeopardize the continued existence of affect listed species or designated or proposed critical habitat, thereby concluding the formal consultation process. The FWS also stated in its biological opinion that it does not anticipate that EPA's action will incidentally take listed species. EPA considered the opinion of the FWS, the Federal expert agency on listed species and their critical habitat, in proceeding with its approval action. See response to Comment 3 immediately below.

Comment 3; Arizona Center for Law in the Public Interest

EPA's Approval Of The AZPDES Program Will Jeopardize The Continued Existence Of Dozens Of Federally-Listed Species And Result In The Destruction Or Adverse Modification Of Critical Habitat.

EPA's approval of the AZPDES program is no small procedural matter for the approximately sixty endangered and threatened species in Arizona. As already noted, it is EPA's position that transferring the NPDES program to the State of Arizona will terminate application of the requirements of section 7 of the ESA with respect to NPDES permitting, thus eliminating one of the most important legal protections for these species and their habitats. Nonetheless, EPA asserts that such action will have at most "insignificant and/or discountable" impacts on listed species and critical habitat. One need look no

further than the substantial impacts that have and continue to occur to listed species and critical habitat in Arizona from EPA-issued NPDES permits, where the requirements of section 7 of the ESA are in effect, to understand that EPA's claim is simply incorrect.

Stormwater discharge and point source discharge permits for residential and commercial urban development projects often result in significant adverse impacts to listed species and critical habitat. Obvious adverse effects of such NPDES permitting include the elimination of listed species, destruction of occupied and unoccupied habitat, and adverse modification of designated critical habitat. These effects are often significantly multiplied when considered alongside impacts resulting from Clean Water Act section 404 permits. Other NPDES permit impacts include increased domestic water consumption, degradation of watershed and water quality conditions, and resulting harm to riparian or aquatic listed species and designated critical habitat, often many miles away from the permitted development.

The cactus ferruginous-pygmy owl ("pygmy owl") is one of dozens of species in Arizona impacted by projects and activities authorized by EPA's NPDES program. The pygmy owl is threatened primarily by past and ongoing destruction and fragmentation of habitat, particularly within the Tucson Basin, from urban and commercial development, much of which is authorized by NPDES permits. The harmful effects of NPDES permitting is also apparent in the San Pedro River basin where increased pollution is threatening the species that depend on that water-based ecosystem for survival. The FWS has detailed a number of concerns with regard to NPDES permitting in and around the San Pedro River basin including the

impacts of the effects of consumptive water use from urban development. [See Letter to Alexis Strauss from U.S. FWS dated April 27, 2000.] According to the FWS, annual groundwater withdrawals exceed replacement in the Sierra Vista subwatershed by roughly 7,000 acre-feet, and are ultimately expected to diminish or eliminate baseflow in the river. Listed species such as the southwestern willow flycatcher, Huachuca water umbel, spikedace and loach minnow, and their critical habitats, will all be affected by any such baseflow reduction. Groundwater pumping for new urban development is clearly an indirect effect of NPDES permitting in this region.

FWS has also detailed a number of harmful indirect effects of urban development in the Verde River basin of central Arizona. For example, in its December 26, 2001 Biological Opinion on the NPDES permit for the "Homestead at Camp Verde," a development project, the FWS found that: Urbanization near the Verde River has reduced the ability to establish dense riparian vegetation. Development has created and maintained the demand for domestic and industrial water use resulting in increased groundwater pumping and flood control structures that alter stream hydrology and also increases bridges, roads, vehicles, sand and gravel mining and other industrial and commercial uses detrimental to riparian habitat. Urbanization has also increased the demand for recreational use of remaining riparian areas for trails, campgrounds and use of river areas for off-road vehicles, etc. Developments and recreation increase trash, lawns, bird feeders, and habitat fragmentation, and as a result, an increase of predators or passerines such as cowbirds house cats, grackles, and ravens . . .

[Biological Opinion, Homestead at Camp Verde NPDES Permit, December 26, 2001.] Overuse of groundwater in the Verde River basin is also a major concern. According to FWS, "the extent of groundwater overdraft (water resources that are not being replenished) in [Chino and Verde valleys] ... was considered critical ... " *Id.* [Furthermore, urbanization also results in watershed degradation, including increased runoff, erosion, altered hydrogeomorphology, incision, lowered water table, and resulting losses of riparian vegetation. These indirect effects of NPDES permitting adversely affect Verde River basin riparian and aquatic habitats, and dependent federally listed species, including the Bald eagle, Southwestern willow flycatcher, loach minnow, spikedace, razorback sucker and their designated critical habitats.

The examples above are merely a sampling of the negative impacts that are likely to result from EPA approval of the AZPDES program. At present, these impacts must, at least, be examined through the ESA's section 7 consultation process. Once the program is transferred to the State, it is apparently EPA's position that section 7 consultation will rarely, if ever, occur, thereby substantially increasing the likely impacts of AZPDES permits on listed species and critical habitat. Notwithstanding EPA's claims to the contrary, neither the provisions of the Clean Water Act, Arizona's water quality standards, or EPA's proposed oversight of the AZPDES program are adequate substitutes for section 7 consultation under the ESA. In short, without a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program.

Response: EPA agrees that the substantive and procedural requirements of ESA section 7 do not apply to State NPDES permits issued pursuant to State law. EPA disagrees that its approval of the AZPDES program will jeopardize the continued existence of listed species and result in the destruction or adverse modification of their critical habitat. EPA also disagrees with the commenter's assertions that "[w]ithout a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program."

On December 3, 2002, FWS, the expert Federal agency on listed species and critical habitat, issued a biological opinion concluding that EPA's proposed approval of the AZPDES program is not likely to jeopardize the continued existence of listed species or designated or proposed critical habitat. The FWS also stated in its biological opinion that it does not anticipate that EPA's action will incidentally take listed species. EPA considered the opinion of the FWS in proceeding with its approval action. As stated above, during the consultation process, EPA forwarded to FWS for consideration all ESA-related comments received during the public comment period on its proposed approval of the AZPDES program. EPA believes that FWS appropriately considered all relevant information regarding the effects of the approval action on listed species and designated and proposed critical habitat in arriving at its conclusion, including a broad range of direct and indirect effects of EPA's approval action. The objections of the commenter relate primarily to the commenter's judgments concerning the effects of the AZPDES program approval on various species. We believe

that no information has been submitted which would indicate that the conclusions in FWS's biological opinion are incorrect.

Section 7 of the ESA and its implementing regulations require that EPA consult with FWS regarding the effects of its actions where EPA's action may affect listed species or critical habitat, and that EPA comply with the substantive requirements of ESA Section 7. EPA has complied with the ESA and its regulations in this regard.

The CWA authorizes States to administer the NPDES program under State law provided the State program meets the conditions specified in section 402(b) of the Act and EPA regulations. Section 402(b) states that EPA shall approve each submitted State program unless EPA determines that the State does not have adequate authority to meet the criteria in that section, which pertain to protection of water quality, permitting procedures, and enforcement. EPA has determined that the State of Arizona has met all such criteria. In addition, the FWS has concluded that EPA's approval of the AZPDES program is not likely to jeopardize the continued existence of listed species or designated or proposed critical habitat, or result in the incidental take of listed species. EPA concurs with this conclusion. Thus, EPA's program approval is appropriate.

Comment 4; Arizona Center for Law in the Public Interest

Unless and until the deficiencies described [in Comments 1 to 3 immediately above] are remedied, EPA lacks the authority to approve the AZPDES program.

Response: EPA disagrees. See response to Comments 1 through 3 immediately above.

Comment 5; Bruce Nigel

Examination of the delegation agreement and its concomitant documentation reveal that the ADEQ will offer no protection to endangered species or critical habitat if that department is allowed to issue its own NPDES permits. If the State of Arizona is allowed to issue its own NPDES permits, those permits will be at variance with the objectives of the CWA. The CWA specifically states as one of its goals to ensure the protection and propagation of species. Endangered species is obviously a subset of all species. Therefore, without protection for the endangered segment of "species," as the delegation agreement currently allows, any authority granted to the state would be in violation of the CWA. The CWA, in its delegation to states language, allows that any delegation should result in authority no less stringent than the Clean Water Act. The delegation request from Arizona should be rejected because the results of that delegation would translate into a state authority that is less stringent than the CWA. This would be due to the deficiency of protection offered to endangered species, resulting in a negative effect upon species propagation. Further, federal law requires all permits issued under the authority of the CWA to cause no adverse effect or "taking" upon an endangered or threatened species. This is effective when, in the parlance of those who are experienced with endangered species litigation, a "nexus" exists with a federal action. As the ADEQ proposes to accept, and EPA proposes to offer, federal funds for this program, a nexus will exist. Therefore, EPA should reject the application for NPDES

program delegation because the ADEQ will fail to provide that endangered and threatened species are not subject to a taking or affected adversely by the issuance of NPDES permits, or the activities authorized by those permits, even though a nexus indisputably will exist.

Response: EPA disagrees with the commenter that approval of the AZPDES program is not consistent with CWA requirements. As described above, the CWA authorizes States to administer the NPDES program under State law provided the State program meets the criteria specified in section 402(b) of the Act and associated EPA regulations. EPA has determined that the State of Arizona has met all such criteria, and the State's program therefore meets the requirements of the CWA. The commenter has not indicated which, if any, of these criteria he believes are not met by the State program.

EPA also notes that listed species and critical habitat are in fact provided with protection under the State's NPDES program. The CWA's goal to ensure the protection and propagation of species is carried out through numerous CWA programs, including, among others, the NPDES permitting program. By carrying out the NPDES permitting program under State law, ADEQ will in fact be providing protection to listed species by ensuring continued protection of water quality throughout the State. Also, we note that the State will provide notice to the FWS of proposed AZPDES permits, and has the authority to consider the views of the Service in appropriate cases. 40 C.F.R. §§ 124.10(c)(1)(iv)), 124.59(b) and (c).

It is not clear which "Federal law" the commenter refers to in the comment that "Federal law requires all permits

issued under the authority of the CWA to cause no adverse effect or 'taking' upon an endangered or threatened species." If the commenter is referring to the ESA, we disagree with the commenter's interpretation of the statute. For example, the commenter's interpretation fails to take into account that section 7(o) of the ESA creates exceptions to the prohibitions against "take" found in section 9 of the ESA. If the commenter is referring to the CWA, the approval criteria in CWA 402(b) do not require that the State of Arizona protect listed species or that AZPDES permits cause no adverse effect or "taking" upon an endangered or threatened species, regardless of how the permitting program is funded. In any event, the FWS has determined that EPA's approval action is not likely to jeopardize any listed species or result in the destruction or adverse modification of designated or proposed critical habitat, and does not anticipate that EPA's approval action will result in incidental take of listed species. EPA believes that its approval action is consistent with the requirements of the ESA and the CWA.

See also response to Comments 1 through 4 immediately above.

Comment 6; The State of Arizona Game and Fish Department

With the approval of this program, ADEQ's permitting actions would not be subject to Section 7 consultation under the Endangered Species Act. However, the department understands that Endangered Species Act issues have been addressed in the Memorandum of Agreement (66 FR 11202) between the EPA and U.S. Fish and Wildlife Service. This agreement will serve as a guideline for EPA, FWS, and the State of Arizona to

ensure that NPDES permits will not negatively impact endangered and threatened species.

The Department has worked cooperatively with ADEQ and applicants during the preliminary review of NPDES permit applications to ensure that potential impacts to special status species and other fish and wildlife resources are considered and addressed (avoided or minimized) early-on during the permitting process. We look forward to continuing this level of cooperation between our agencies, and to seek opportunities for potential habitat restoration or enhancements projects that benefit fish and wildlife in Arizona.

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 7; Greater Phoenix Chamber of Commerce and Arizona Chamber of Commerce

The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to

allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ, as a state agency, will not be required to formally consult with USFWS when it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits. Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia,* USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R.

§ 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(d) & R18-9-A908(A)(4)(b). Moreover, EPA's own review of the draft permits presumably will be coordinated with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act. See* 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants. Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be

taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). *See* 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEQ will not adversely affect listed species.

Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved. The extent of federal control and involvement in this state is pervasive. The federal government owns almost 70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

Private action outside of Section 7 that results in a "taking" (*i.e.*, killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS. This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of the current process. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the

application. See also response to Comment 8 in Category IV above for EPA's response pertaining to NHPA issues.

Comment 8; Withey Anderson & Morris

Identical to comment 7.

Comment 9; Homebuilders Association of Central Arizona

Identical to comment 7.

Comment 10; Arizona Association of Industries

Comment 7 incorporated by reference.

Response to Comments 8, 9, and 10: EPA appreciates the commenters' support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 11; Diamond Ventures Inc.

The U.S. Congress has expressed a strong preference to have states take the lead role in the protection of waters within their boundaries so long as sufficient program support is generated within states and so long as the statutory elements of the Clean Water Act are satisfied. The AZDES [sic] program has been designed consistent with the programs in place in 44 other states relative to the endangered species Act and Section 7 consultations with the U.S. Fish and Wildlife Service. Like other states that administer pollution discharge permits, procedures have been built into the AZDES [sic] program to provide the appropriate and legally mandated oversight of the program by EPA and U.S. Fish and Wildlife. The fact that

Arizona would not be subject to a Section 7 consultation requirement when issuing a permit under the AZDES [sic] program is not unusual and is, in fact, typical.

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 12; Navajo Nation

The public notice for the AZPDES program submission that appeared in the Federal Register (August 1, 2002, Volume 67, Number 148, Page 49916-49920) states that "EPA will not make a final decision on AZPDES program approval until after: . . . (2) completion of the ongoing consultations with the U.S. Fish and Wildlife Service on effects program approval may have on endangered or threatened species and their designated critical habitat; and (3) completion of ongoing consultations with the State Historic Preservation Officer on effects program approval may have on historic properties or sites listed or eligible for listing in the National Register of Historic Places." No documents comprising the AZPDES program submission discuss the AZPDES permit review procedures involving potential effects on endangered or threatened species and their designated critical habitats and historic properties or sites. For the AZPDES program submission, EPA Region 9 initiated formal consultation with the U.S. Fish and Wildlife Service on June 21, 2002. The Federal Register public notice imparts that EPA's action to delegate NPDES program authorization is itself a federal action requiring consultation under the ESA and NHPA but not the " . . . subsequent AZPDES permit actions. . . ." In the Navajo Nation's development of its own NPDES program

submission, Navajo EPA participated in extensive work (meetings, correspondences, teleconferences, etc.) starting in 1995 with the U.S. Fish and Wildlife Service, the New Mexico State Historic Preservation Officer (SHPO), and the Advisory Council for Historic Preservation (ACHP). Navajo EPA subsequently reached closure with ACHP concerning NNPDES [sic] permit actions and historic properties and sites. For NNPDES [sic] permit actions and endangered or threatened species and their designated critical habitats, EPA opted to progress toward the use of its proposed "national MOA" with the U.S. Fish and Wildlife Service. The intent was to have the "NPDES MOA Between the Navajo Nation and the U.S. Environmental Protection Agency Region 9" spell out how Navajo EPA see to it that NNPDES [sic] permit actions have no effect on endangered or threatened species and their designated critical habitat and on the preservation of historic properties. EPA's public notice of the AZPDES program submission without consultations completed with the U.S. Fish and Wildlife Service and the SHPO or without any ESA and NHPA discussion in permitting procedures gives the impression that EPA is utilizing a different (abbreviated) NPDES program approval format for the State of Arizona.

Response: In addition to completing all required procedural requirements for approval of the AZPDES program, and determining that the AZPDES program meets the requirements of CWA section 402(b), EPA has completed a formal consultation process with the FWS under section 7 of the ESA. As discussed in detail in EPA's BE and in the response to Comment 2 immediately above, EPA and the FWS have signed the National MOA which describes the manner in which EPA and the FWS

will work together to ensure that States and Tribes administering the NPDES program protect listed endangered and threatened species. EPA will follow this agreement with respect to its oversight of the AZPDES program. EPA believes that the procedures it followed for approving the AZPDES program are consistent with the requirements of the CWA and the ESA. See also response to Comment 7 in Category IV above for EPA's response pertaining to NHPA issues.

XIII. Category; Support for EPA Approval of AZPDES Program

Comment 1; Arizona Chamber of Commerce & Greater Phoenix Chamber of Commerce; Withey, Anderson & Morris; Home Builders Association of Central Arizona

Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- *Improved communication.* It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are

maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices throughout the state, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco. The opportunities for face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.

Increased understanding of local conditions. A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B).

More Efficiency. We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer

this program, having had extensive involvement in the NPDES program under EPA's leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit ("APP") program (which, like the NPDES program, contains both technology-based and standards-based permitting requirements). Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona's APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,[5] ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

Enhanced environmental protection. The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean

[5] State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona's willingness to support the program and ADEQ's ability to manage the program. We find these criticisms unfounded.

The State of Arizona has shown a solid commitment to the AZPDES program. The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted $472,400 and 9 FTE positions in FY2001-02 and $432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future,

the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

ADEQ is fully capable of administering this program. In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

The above comments were incorporated by reference by the Arizona Association of Industries

Comment 2; Diamond Ventures Inc.

Diamond Ventures, Inc. respectfully requests that EPA approve the application of ADEQ to administer the NPDES program. Support for this application comes from a wide range of "stakeholders" and a wide range of the regulated community. The application is fully supported by the State of Arizona with approval (by 2/3rd margin) by both houses of the Arizona Legislature. The Arizona Governor's Office and Arizona Legislature placed the highest priority upon this application and resulting program by establishing a full funding commitment to ADEQ for the administration of this program even though these are lean years for state government.

Our firm believes that the adoption of the program is good for the State of Arizona and strongly supports the transition of the permitting responsibility from EPA Region IX to ADEQ. The following reasons support this conclusion:

1) Local Control and Understanding of Local Conditions: A state agency is better prepared to understand and respond to local conditions in a manner that will result in improved environmental quality for future generations. The administration of NPDES program by the individual states has been embraced by the U.S. Congress through the Clean Water Act, and implemented in 44 states.

2) Improved Communications: Improved environmental protection is dependent upon the quality of communication between the regulatory agency and regulated community. ADEQ maintains offices in Phoenix, Tucson, and Flagstaff and is therefore in an advantageous position to maintain the highest quality and direct communication with the regulated community.

3) ADEQ Qualifications: ADEQ has demonstrated that it is fully capable of administering complex environmental programs. With committed resources, as mentioned above, the agency has extensive permitting and enforcement experience under the current NPDES and Aquifer Protection Permit programs. Contrary to certain criticisms leveled at ADEQ relative to the proposed application, ADEQ is fully capable to administer the Arizona Pollutant Discharge Permit program.

Comment 3; Pinnacle West Capital Corporation

Pinnacle West Capital Corporation (PAW) respectfully requests that the United States Environmental Protection Agency ("EPA") approve the application of the Arizona Department of Environmental Quality ("ADEQ") to administer the National Pollutant Discharge Elimination System ("NPDES") program.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. The operation of this principle is demonstrated by the fact that all but six states have been authorized to administer the NPDES program. State administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for better communication and a better understanding of issues unique to Arizona. For example, the AZPDES enabling legislation allows the ADEQ Director to "adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article." Ariz. Rev. Statutes § 49-255.01(B) (in part). In addition, additional operating and budget efficiencies can he achieved through the interaction of the AZPDES program with other state programs, such as Arizona's Aquifer Protection Permit program.

The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states.

As an entity regulated under the NPDES program, PAW and its subsidiaries recognize the benefits of working with regulators who can, and have, familiarized themselves with our facilities by visitation and interactions stemming from other regulatory programs. This familiarity increases efficiencies in all respects of

permit and compliance management, and it has the potential to increase the effectiveness of program implementation. We believe the ADEQ has prepared itself for AZPDES implementation at the high level.

Comment 4; Robson Communities

We strongly support ADEQ's application. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection. At the hearing we provided examples of where ADEQ availability allowed permitting and compliance issues to be resolved efficiently and expeditiously. For example, on one occasion, we received homeowner complaints about effluent discharges in washes near our Saddle Brooke community. With ADEQ assistance, we inspected the situation and were able to document that the discharges were stormwater-only. On another occasion, we had a particularly complicated NPDES permitting issue and a site visit by ADEQ cleared up the matter quickly. Both of these illustrate the value of having a water quality program that is operated at the State level.

We disagree with claims being made that ADEQ lacks the resources or ability to administer the AZPDES program. Rather, ADEQ has exhibited the clear ability to administer complex permitting programs both through its involvement with the NPDES program to date as well as its administration of the Aquifer Protection program, a

program developed entirely without federal oversight or direction.

ADEQ will have the necessary resources to carry out this program. The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states.

Comment 5; City of Phoenix

Please be advised that the City of Phoenix supports the State of Arizona request to operate the NPDES program within Arizona as outlined in the Federal Register announcement dated August 1, 2002 (67 FR 49916). The City of Phoenix participated in the stakeholder effort to develop the Arizona Pollutant Discharge Elimination System (AZPDES) Permit Program. Based on the level of discussions and communications that occurred during the stakeholder meetings, the City is confident that the State will devote the necessary resources to make the program a success. This obviously includes implementation of a program that meets the requirements of the Clean Water Act but also incorporates flexibility, where it exists, to consider the unique characteristics of the State's water environment.

The first step in this process is the approval to proceed by the United States Environmental Protection Agency (EPA). We respectfully ask that USEPA approval

be given to the State of Arizona to proceed without further delay.

Response to Comments 1-5: EPA appreciates the commenters' support. As with all comments submitted, EPA considered them in making its final determination to approve the State of Arizona's submission.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 03-71439

PETITION FOR REVIEW

(Filed April 2, 2003)

1. Defenders of Wildlife ("Defenders"), the Center for Biological Diversity (the "Center") and Craig Miller hereby petition for review of the Environmental Protection Agency's ("EPA") final rule approving the application of the State of Arizona to administer and enforce the Arizona Pollutant Discharge Elimination System ("AZPDES") Program. *See* Approval of Application by Arizona to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 67 Fed. Reg. 79629 (December 30, 2002) (Attached).

2. Defenders is a national nonprofit corporation headquartered in Washington, D.C. with offices throughout the United States, including Tucson, Arizona. Defenders has more than 400,000 members and supporters, many of whom reside in Arizona. Defenders is dedicated to the conservation of all native wild animals and plants in their natural communities. Defenders has

invested considerable organizational resources in protecting Arizona's native species of wildlife and their habitats and, in particular, the endangered cactus ferruginous pygmy-owl ("pygmy-owl"). Defenders will continue to monitor and aggressively advocate for the conservation of these species and their habitat. Defenders also regularly publishes, for use of its members, information regarding Arizona wildlife and habitat, including the pygmy-owl.

3. Defenders brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational and scientific activities involving Arizona's native wildlife and habitat, including the pygmy-owl. The interests of Defenders and its members in observing, studying, and otherwise enjoying Arizona wildlife, including the pygmy-owl, and their habitat, and in obtaining and disseminating information regarding these species, have been and will be harmed by EPA's approval of the AZPDES program, and by the failure of EPA to adequately address the impacts of its action on the survival and recovery of the pygmy-owl and other federally-protected species in Arizona, pursuant to section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536. EPA's action, and its failure to comply with its obligations under section 7 of the ESA, has caused the loss of significant legal protections for endangered and threatened species in Arizona, including the pygmy-owl, and will result in the destruction of habitat which these species need to survive and recover. If the pygmy-owl's habitat and that of other listed species in Arizona is destroyed, then Defenders' members and staff will no longer be able to recreate in or otherwise enjoy this habitat. And if these species are

unable to survive and recover, then Defenders' members and staff will no longer be able to observe and otherwise enjoy these species in the wild.

4. The Center is a non-profit conservation organization based in Tucson, Arizona. The Center has been and will continue to be heavily involved in species and habitat conservation issues in Arizona. The Center's members and staff reside, work, and recreate within the range of the pygmy-owl and that of other listed species in Arizona, and otherwise derive enjoyment from Arizona's native wildlife and habitats, including the Sonoran desert ecosystem around Tucson, where the pygmy-owl and other species reside. The Center's staff and members have extensively studied the pygmy-owl and other listed species in Arizona and their habitat, and have worked tirelessly to protect them, and plan to continue doing so in the future. Information gathered by the Center regarding the pygmy-owl and other Arizona species and their habitat is disseminated regularly to its members and the public.

5. The Center brings this action on its own institutional behalf and on behalf of its members. The interests of the Center and its members in observing, studying, and otherwise enjoying the pygmy-owl and its habitat and other listed species in Arizona, and in obtaining and disseminating information regarding the survival of these species, have been and will be harmed by EPA's approval of the AZPDES program, and by the failure of EPA to adequately address the impacts of its action on the survival and recovery of the pygmy-owl and other federally-protected species in Arizona, pursuant to section 7 of the ESA. If the pygmy-owl's habitat and that of other listed species in Arizona is destroyed, then the Center's

members and staff will no longer be able to recreate in or otherwise enjoy this habitat. And if these species are unable to survive and recover, then the Center's members and staff will no longer be able to observe and otherwise enjoy these species in the wild.

6. Craig Miller is an employee and member of Defenders, and a resident of Pima County, Arizona. Mr. Miller has both a personal and professional interest in EPA's action and specifically, its impact on the pygmy-owl and its habitat, and other listed species in Arizona. Mr. Miller has frequently hiked, backpacked, climbed, skied, birded and studied wildlife extensively in the riparian and adjacent upland habitat of the pygmy-owl and that of other listed species in Arizona. Mr. Miller's professional interest in the pygmy-owl includes studying the species, broadening the scientific understanding of its biology and ecology, and helping with efforts to ensure the protection and recovery of the species and its habitat. Mr. Miller is a member of the pygmy-owl implementation group of the pygmy-owl recovery team. Mr. Miller intends to continue his personal and professional interests in the pygmy-owl and its habitat, and other listed species in Arizona, in the future.

7. Mr. Miller's interests in the pygmy-owl and its habitat, and other listed species in Arizona, have been and will be harmed by EPA's action. In approving the AZPDES program without fully complying with its obligations under section 7 of the ESA, EPA has failed to address the impacts of its action on the survival and recovery of the pygmy-owl and other listed species. EPA's action also means that the destruction and fragmentation of the pygmy-owl's habitat from commercial and residential development will proceed with little or no scrutiny under

the ESA. If the pygmy-owl's habitat continues to be destroyed and fragmented, the species will be unable to survive and recover.

Respectfully submitted,

April 1, 2003

/s/ [Illegible]
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67 Fed. Reg. 79629 (Dec. 30, 2002)

ENVIRONMENTAL PROTECTION AGENCY

FRL-7432-2]

State Program Requirements; Approval of Application by Arizona To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On December 5, 2002, the Regional Administrator for the Environmental Protection Agency, Region IX (EPA), approved the application by the State of Arizona to administer and enforce the Arizona Pollutant Discharge Elimination System (AZPDES) Program, for all areas within the State, other than Indian country. The authority to approve State programs is provided to EPA in section 402(b) of the Clean Water Act (CWA). The State will administer the approved program through the Arizona Department of Environmental Quality (ADEQ), subject to continuing EPA oversight and enforcement authority, in place of the National Pollutant Discharge Elimination System (NPDES) program previously administered by EPA in Arizona. The program is a partial program to the extent described in the section of this Notice entitled National Pollutant Discharge Elimination System (NPDES) program "Scope of the AZPDES Program." In making its decision, EPA considered and addressed all comments and issues raised during the public comment period.

DATES: Pursuant to 40 CFR 123.61(c), the AZPDES program was approved and became effective on December 5, 2002.

FOR FURTHER INFORMATION CONTACT: Matthew Mitchell, USEPA Region IX (WTR-5), 75 Hawthorne Street, San Francisco, CA, 94105, (415) 972-3508 or Chris Varga, Federal Permits Unit, Arizona Department of Environmental Quality, 1110 W. Washington St., Phoenix, AZ, 85007, (602) 771-4665. Part of the State's program submission and supporting documentation is available electronically at the following Internet address: http://www.adeq.state.az.us/environ/water/permits/federal.html

SUPPLEMENTARY INFORMATION: Arizona's application was described in the **Federal Register** (67 FR 49916) on August 1, 2002, in which EPA requested comments. Notice of Arizona's application was published in the Arizona Republic on August 13, 2002. A public hearing on the application was held on September 4, 2002, in Phoenix, AZ.

Section 402(c)(1) of the CWA provides that ninety days after a State has submitted an application to administer the NPDES program, EPA's authority to issue such permits is suspended unless EPA disapproves or approves the State's application. 40 CFR 123.21(b)(1). This ninety day statutory review period ended on October 8, 2002. However, because of the many complex issues that were raised with respect to the State's program and the need to address them in a comprehensive manner, EPA was unable to make a final decision by October 8, 2002. Thus, EPA suspended issuance of NPDES permits in Arizona on October 8, 2002. However, failure to make a decision by the October 8, 2002 deadline did not mean that the State

automatically gained NPDES authority. It is EPA's interpretation that a State agency does not gain NPDES authority unless and until EPA approves the State program, consistent with CWA section 402(b) and 40 CFR 123.1. As of December 5, 2002, the ADEQ is now authorized to issue AZPDES permits under the CWA in all areas within the State, except for in Indian country.

A. Scope of the AZPDES Program

The AZPDES program is a partial program which conforms to the requirements of section 402(n)(3) of the CWA. Specifically, Arizona is being approved to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works.

Pursuant to CWA section 402(d), in specified circumstances EPA retains the right to object to AZPDES permits proposed by ADEQ, and if the objections are not resolved, to issue the permits itself. EPA also will retain jurisdiction over all NPDES permits it has issued in Arizona until ADEQ reissues them as AZPDES permits. Finally, EPA and State have agreed that EPA may retain permitting authority in certain limited circumstances, as set forth in the Memorandum of Agreement between EPA and ADEQ.

As part of operating the approved program, ADEQ generally will have the lead responsibility for enforcement. However, EPA will retains its full statutory enforcement authorities under CWA sections 308, 309, 402(i) and 504. Thus, EPA may continue to bring federal enforcement action under the CWA in response to any violation of the

CWA, as appropriate. In particular, if EPA determines that the State has not taken timely and/or appropriate enforcement action against a violator in Arizona, EPA may take its own enforcement action.

B. Public Comments

The EPA received numerous public comments concerning the Arizona program.

Several commenters urged the EPA to approve the State's program. The EPA agrees that the State program should be approved at this time outside Indian country.

Several commenters were concerned about impacts on endangered species and historic properties associated with EPA's approval of the AZPDES program. In addition, a few commenters urged that the EPA reject Arizona's program application on a variety of grounds.

All public comments are addressed in EPA's Response to Comments Document, dated December 5, 2002. In addition, EPA actions taken in accordance with the requirements of the Endangered Species Act and the National Historic Preservation Act are described below in Section C.

C. Other Federal Statutes

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), requires that federal agencies ensure, in consultation with the United States Fish & Wildlife Service (FWS) that actions they authorize, fund, or carry out are not likely to jeopardize the continued

existence of listed threatened or endangered species (listed species) or result in the destruction or adverse modification of critical habitat designated for such listed species.

EPA consulted with the FWS under section 7(a)(2) of the ESA regarding the effects of the AZPDES program approval on listed species and designated critical habitat. On December 3, 2002, the Service issued a biological opinion concluding that EPA's approval of Arizona's NPDES application is not likely to jeopardize the continued existence of listed threatened or endangered species or result in the destruction or adverse modification of their critical habitat. In the opinion, the FWS also stated that it does not anticipate that EPA's action will result in the incidental take of listed species. Issuance of the biological opinion with these findings concludes the consultation process required by ESA section 7(a)(2) and reflects the Service's agreement with EPA that the approval of the State program meets the substantive requirements of the ESA.

National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), the Agency consults with the appropriate State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer on federal undertakings that have the potential to affect historic properties listed or

eligible for listing in the National Register of Historic Places. During EPA's review of the Arizona NPDES application, EPA engaged in discussions with the Arizona SHPO regarding EPA's determination that approval of the State permitting program would have no effect on historic properties.

On August 23, 2002, EPA provided the Arizona SHPO's Office with EPA's determination that approval of Arizona's application would have no effect on historic properties in Arizona. As part of the coordination process, the SHPO's Office raised certain issues regarding approval of the Arizona program for further discussions. By letter dated September 23, 2002, the SHPO withdrew these issues for consideration and informed EPA that it was working with ADEQ to coordinate its activities in the protection of Arizona's cultural resources. On October 18, 2002, the SHPO and ADEQ entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive notices of certain proposed permit actions. This MOU further provides for coordination between ADEQ and the SHPO to resolve any identified issues to ensure that AZPDES permits will comply with Arizona water quality standards and Arizona laws protecting historic properties. For those permits with the potential to adversely affect historic properties, ADEQ and the SHPO agreed to seek ways to avoid, minimize or mitigate any adverse effects to historic properties stemming from the proposed permit. EPA believes that the agreement between ADEQ and the SHPO is consistent with EPA's determination that approval of the State permitting program would have no effect on historic properties.

Regulatory Flexibility Act

Based on General Counsel Opinion 78-7 (April 18, 1978), EPA has long considered a determination to approve or deny a State NPDES program submission to constitute an adjudication because an "approval," within the meaning of the APA, constitutes a "license," which, in turn, is the product of an "adjudication." For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Under the RFA, whenever a Federal agency proposes or promulgates a rule under section 553 of the Administrative Procedure Act (APA), after being required by that section or any other law to publish a general notice of proposed rulemaking, the Agency must prepare a regulatory flexibility analysis for the rule, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the Agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule. Even if the NPDES program approval were a rule subject to the RFA, the Agency would certify that approval of the State's proposed AZPDES program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve an NPDES program merely recognizes that the necessary elements of an NPDES program have already been enacted as a matter of State law; it would, therefore, impose no additional obligations upon those subject to the State's program. Accordingly, the Regional Administrator would certify that this program, even if a rule, would not have a significant economic impact on a substantial number of small entities.

E. Notice of Decision

I hereby provide public notice that EPA has taken final action authorizing Arizona to implement the NPDES program in all areas of the State except for Indian Country.

Authority: This action is taken under the authority of section 402 of the Clean Water Act as amended, 42 U.S.C. 1342.

Dated: December 5, 2002.

Wayne Nastri,
Regional Administrator, Region IX.

[FR Doc. 02-32907 Filed 12-27-02; 8:45 am]

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION, AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA,

Applicants in Intervention.

Case No. 03-71439

HOME BUILDERS' MOTION TO INTERVENE AND SUPPORTING MEMORANDUM

(Filed May 1, 2003)

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Movant National Association of Home Builders, a non-profit corporation organized under the laws of Nevada, hereby states that it has no parent companies or subsidiaries, and that it has issued no shares of stock to the public; said association has more than 800 state and local home builders associations with whom it is affiliated, but all of those associations are, to the best of National Association of Home Builder's knowledge, non-profit corporation that have not issued stock to the public. Movant Southern Arizona Home Builders Association, a non-profit corporation organized under the laws of Arizona, hereby states that it has no parent companies or subsidiaries, and that it has issued no shares of stock to the public. Movant Home Builders Association of Central Arizona, a non-profit corporation organized under the laws of Arizona, hereby states that it has no parent companies or subsidiaries and that it has issued no shares of stock to the public. Both Southern Arizona Home Builders Association and Home Builders Association of Central Arizona are affiliated with National Home Builders Association.

MOTION TO INTERVENE

The National Association of Home Builders, the Southern Arizona Home Builders Association, and the Home Builders Association of Central Arizona (collectively, "Home Builders") hereby move for leave to intervene in this action pursuant to Rule 15(d), *Fed.R.App.P.* Home Builders have a protectable interest in the subject matter of this action, the Environmental Protection Agency's approval of the State of Arizona's application to administer the National Pollutant Discharge Elimination System ("NPDES") in Arizona. Home Builders, whose members are regulated under the NPDES Program, have invested

significant resources in the development of Arizona's program, the Arizona Pollutant Discharge Elimination System or "AZPDES," and will benefit from Arizona's administration of that program. Home Builders' interests may be impaired by disposition of this action in their absence, and the existing parties will not adequately represent Home Builders' position. Accordingly, Home Builders should be allowed to intervene in this action.

Home Builders' motion is supported by the following Memorandum of Points and Authorities and by the attached declarations of Alan Lurie, Executive Vice President of the Southern Arizona Home Builders Association, and Connie Wilhelm, President and Executive Director of the Home Builders Association of Central Arizona.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF MATERIAL FACTS AND HOME BUILDERS' INTERESTS.

One of the stated policies of the Clean Water Act ("CWA") is to "recognize, preserve, and protect the primary responsibilities and rights of States" in the restoration and maintenance of water quality and in application of the CWA. 33 U.S.C. § 1251(b). Indeed, one of Congress' primary objectives in enacting the CWA was to encourage states to "assume the major role in the operation of" the NPDES Program, which is one of the CWA's most important permitting programs. *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1430 (9th Cir. 1991), *quoting Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). In keeping with this objective, on December 5, 2002, the

Environmental Protection Agency ("EPA") approved the State of Arizona's application to administer the NPDES Program in Arizona. *See Approval of Application by Arizona to Administer the National Pollution Elimination System (NPDES) Program; Arizona,* 67 Fed Reg. 79,629 (Dec. 30, 2002) (copy attached to Petition). Arizona thereby became the forty-fourth state to receive program approval.

The NPDES Program is now being administered locally by the Arizona Department of Environmental Quality ("ADEQ") as the AZPDES Program, rather than by EPA's Region IX Office in San Francisco, California. The transfer was intended to "put[] the program in the hands of those most familiar with the environmental issues and the people of the state." *See* Region 9: News Releases, *EPA Approves Arizona Pollutant Discharge Permits Program* (Dec. 5, 2002) (copy attached as Exhibit A). The approval represents the culmination of more than two years' work by ADEQ, interested parties and industry groups, including Home Builders, to develop the necessary legal and administrative structure to support the AZPDES Program.

Home Builders were actively involved in and supported EPA's decision to transfer its NPDES program to ADEQ. *See generally* Lurie Declaration at ¶¶ 6, 11-19 (attached hereto as Exhibit B); Wilhem Declaration at ¶¶ 10-14 (attached as Exhibit C). Home Builders participated in the development of administrative rules designed to implement the AZPDES Program,[1] assisted in

[1] These rules are codified in Title 18, Chapter 9, Articles 9 and 10 of the Arizona Administrative Code.

the development of relevant legislation,[2] and participated in ADEQ's development of the State's equivalent to EPA's Storm Water Construction General Permit, designed to authorize small discharges of storm water containing pollutants with negligible environmental impacts resulting from construction activities.[3] Lurie Declaration at ¶¶ 11-18. Home Builders have invested significant time and money in these efforts because they will benefit from EPA's transfer of authority to the State, by way of reduced compliance costs and fewer and shorter project delays arising from permitting activities. *Id.* at ¶¶ 9-10; Wilhelm Declaration at ¶¶ 11, 16.

Interpreting the transfer of NPDES permitting authority to Arizona as being subject to Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), EPA "consulted" with the U.S. Fish and Wildlife Service ("FWS") pursuant to ESA Section 7(a)(2) and FWS's implementing regulations. *See Approval of Application, supra*, 67 Fed. Reg. at 79,630. In a biological opinion issued December 3, 2002, FWS determined that EPA's action was not likely to jeopardize the continued existence of any listed species of fish, wildlife or plants, and was not likely to destroy or adversely modify designated or proposed critical habitat for such species.

December 16, 2002, Petitioners Defenders of Wildlife and Center for Biological Diversity (collectively, "Defenders") filed an amended complaint against both EPA

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[2] These laws are codified at Arizona Revised Statutes, Title 49, Chapter 2, Article 3.1 and Chapter 4, Article 4.

[3] The State's construction general permit was finalized on February 25, 2003.

and FWS in the United States District Court for the District of Arizona challenging the biological opinion and, indirectly, EPA's approval of the AZPDES Program. *See Defenders of Wildlife, et al. v. Lt. General Robert B. Flowers, et al.,* CV-02-195-TUC-CKJ ("*Defenders v. Flowers*"). In that lawsuit, Defenders challenges FWS's finding that the transfer of the program to Arizona will not jeopardize the continued existence of the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and other unidentified species listed under the ESA. *Defenders v. Flowers,* Second Amended Complaint at ¶¶91-94. Defenders alleges violations of Section 7(a)(2) of the ESA and of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). *Id.* at ¶ 127.

On April 2, 2003, Defenders filed the instant Petition before this Court alleging substantially similar violations. *Compare, e.g.*, Petition at ¶ 3 ("The interests of Defenders and its members in observing, studying, and otherwise enjoying Arizona wildlife, including the pygmy-owl, and their habitat . . . have been and will be harmed by EPA's approval of the AZPDES program, and by the failure of EPA to adequately address the impacts of its action on the survival and recovery of the pygmy-owl and other federally-protected species in Arizona, pursuant to section 7 of the [ESA].") Defenders here assert that "EPA's action, and its failure to comply with its obligations under section 7 of the ESA, has caused the loss of significant legal protections for endangered and threatened species in Arizona . . . and will result in the destruction of habitat which these species need to survive and recover." *Id.* Defenders argue injury from destruction of the pygmy-owl's habitat because then their members and staff will no

longer be able to recreate in or otherwise enjoy this habitat or observe the species in the wild. *Id.* at ¶ 5.

If EPA's decision to approve the AZPDES Program is overturned by this Court, Home Builders will not receive the benefit of their diligent participation in the development of the State's program, and years of effort will have been eviscerated without Home Builders' input on the issues raised by the Petition.

Home Builders, if allowed to intervene, will assert that the Fifth Circuit's ruling in *American Forest & Paper Ass'n v. U.S.E.P.A.*, 137 F.3d 291 (5th Cir. 1998), is applicable in this case and that, consistent with that court's reasoning, Section 7 of the ESA ***does not apply*** to EPA's approval of the AZPDES Program. Home Builders also intend to challenge directly the Petitioners' standing to maintain this action. Such input will aid this Court in its evaluation of the Petition and will likely not be offered by any other party, including EPA.[4]

II. ARGUMENT.

A. Standard for Intervention Under Rule 15(d), *Fed.R.App.P.*

Rule 15(d), *Fed.R.App.P.*, does not specify an applicable standard for intervention. Rather, the criteria for granting intervention are determined by reference to the "statutory design of the Act" under review, in this case

[4] Based on its pleadings filed to date in *Defenders v. Flowers*, it is clear that the United States, for apparent policy reasons, does not intend to make these compelling – and potentially dispositive – arguments in EPA's defense.

the Clean Water Act, 33 U.S.C. §§ 1251 to 1387, and with reference to the policies underlying intervention under Rule 24, *Fed.R.Civ.P. See, e.g., Int'l Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 210 (1965); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985); *Canadian Tarpoly Co. v. U.S. Int'l Trade Comm'n*, 649 F.2d 855, 856 (C.C.P.A. 1981); 20 James Wm. Moore *et al., Moore's Federal Practice*, § 315.24 (3d ed. 1999); Wright, Miller & Cooper; *Federal Practice and Procedure*: Jurisdiction 3d, § 3961.4.

B. The Design of the CWA Militates in Favor of Home Builders' Intervention.

Section 509(b) of the CWA, 33 U.S.C. § 1369(b), the review provision pursuant to which the Petition was apparently filed, is silent on the issue of intervention in direct appeals of decisions made by EPA.[5] Therefore, this Court must first turn to the CWA's overall design to evaluate Home Builders' motion. *Int'l Union*, 382 U.S. at 210; *Texas v. U.S. Dep't of Energy*, 754 F.2d at 551.

As more thoroughly discussed below, Home Builders' members constitute the regulated community in this instance and are subject to the CWA's permitting and enforcement provisions. *See, e.g.*, 33 U.S.C. § 1342 (NPDES permits) and § 1319 (enforcement). Many of Home Builders' members require permits issued under the AZPDES Program. Lurie Declaration at ¶ 5; Wilhelm

[5] Nevertheless, Home Builders note that intervention in direct appeals under the CWA is routine. *See, e.g., Environmental Defense Center v. U.S.E.P.A.*, 319 F.3d 398 (9 Cir. 2003) (intervention by the Natural Resources Defense Council in an action challenging) EPA's "Phase Two" Storm Water Rules).

Declaration at ¶ 5-6. Such authorizations allow for discharges of pollutants associated with construction activities undertaken by Home Builders' members. Wilhelm Declaration at ¶ 5. Home Builders' members would lose the benefit of the AZPDES Program and would be stripped of permits and other authorizations approved under the program if this Court invalidated the program. Lurie Declaration at ¶¶ 27-28; Wilhelm Declaration at ¶¶ 1[illegible]7. *Compare Canadian Tarpoly*, 649 F.2d at 857 (holder of patent held to have sufficient interest potentially affected by adverse ruling on appeal to warrant intervention) *with Texas v. U.S. Dep't of Energy*, 754 F.2d at 551 (utilities whose role in statutory program was limited to finding had insufficient interest to warrant intervention). Home Builders should be allowed to intervene to protect their members' interests in their permits and their ability to obtain new permits under the AZPDES Program, which interests are jeopardized by the potential for an adverse ruling in favor of the Petitioners. *Int'l Union*, 382 U.S. at 212-213; *Canadian Tarpoly*, 649 F.2d at 857.

Further, the CWA's review provisions are cast in the broadest of terms. Section 509(b) of the CWA provides that "any interested person" may obtain review of the actions covered there indicating that relief should be had by all parties affected by EPA's actions. 33 U.S.C. § 1369(b)(1). Home Builders are clearly "interested persons" and would be entitled to file their own petition for review under this provision in the event EPA improperly withheld its approval for, among other reasons, impacts to species protected under the ESA. *Cf. Int'l Union*, 382 U.S. at 209 (discussing National Labor Relations Act's grant of review

to "any person aggrieved by a final order of the Board [of Labor Relations]"). Such inclusive review provisions indicate Congressional intent to allow ***all*** interested and affected parties to participate in, review proceedings authorized under CWA § 1369. *Id.*, 382 U.S. at 216-217.

In sum, Home Builders' interests created by the CWA and recognized in the broad participatory language of CWA § 509(b) militates in favor of Home Builders' intervention in the instant proceeding.

C. The Policies Underlying Rule 24, *Fed.R.Civ.P.*, Support Home Builders' Intervention.

Home Builders also satisfy the requirements of Rule 24, *Fed.R.Civ.P.*,[6] which is construed liberally in favor of potential intervenors like Home Builders and evaluated primarily based on practical considerations, not technical distinctions. *Southwest Center for Biological Diversity*, 268 F.3d at 818. Under this inclusive standard, Home Builders' motion should be granted because, as set forth in the Home Builders' declarations, and as explained below,

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[6] Rule 24(a)(2) inquiries are governed by a traditional four-part test: (1) whether Home Builders' motion is timely; (2) whether Home Builders claim a significantly protectable interest relating to the property or transaction that is the subject of this action; (3) whether Home Builders are so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect that interest; and (4) whether Home Builders' interest is adequately represented by the existing parties to this action. *See, e.g., Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). Rule 24(b) requires only that the proposed intervenor assert a claim or defense in common with the main action. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1127 (9th Cir. 2002).

Home Builders have a protectable interest[7] in EPA's approval of the AZPDES Program and the manner in which EPA Section 7(a)(2) is applied to that approval. Home Builders' interests arise by virtue of their extensive participation in the development of the AZPDES Program, their status as permit holders subject to regulation and enforcement under the CWA and the NPDES program, and their entitlement to the benefits, contemplated by the CWA, of regulation by the State of Arizona. If EPA's decision is reversed by this Court, it will deny Home Builders the benefit of local regulation, and Home Builders are entitled to intervene to protect that interest. Finally, no party to this action will adequately represent Home Builders.

1. Home Builders' interest is sufficient to confer Article III standing and, therefore, satisfies the less strident test for intervention.

Initially, Home Builders note that persons affected by NPDES Program transfers have Article III standing to sue. *See, e.g.*, 33 U.S.C. § 1369(b)(1) (giving "any interested person" a right of review); *American Forest and Paper*

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[7] Home Builders' interest is measured by whether the interest claimed is related to the property that is the subject of the action. *See Sierra Club v. United States U.S.E.P.A.*, 995 F.2d 1478, 1484 (9th Cir. 1993); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). To demonstrate such interest Home Builders need only establish (1) that the interest asserted is protectable under some law, and (2) that there is a relationship between the interest being asserted and the claims at issue in this case. *Sierra Club*, 995 F.2d at 1484. For purposes of intervention, moreover, this Court accepts as true the well-pleaded, non-conclusory, allegations and evidence, including the declarations filed in support of this motion. *Southwest Center*, 268 F.3d at 819-820.

Ass'n, supra, (trade association had standing to challenge transfer of NPDES Program to Louisiana); *Citizens for a Better Environment v. U.S.E.P.A.*, 596 F.2d 720 (7th Cir. 1979) (challenge to EPA's approval of Illinois' program). Home Builders also would have Article III standing to initiate their own action against EPA or FWS concerning the performance of obligations under Section 7 as they relate to EPA's approval process. *See, e.g., Bennett v. Spear,* 520 U.S. 152, (1997) (ranchers and irrigation districts had standing to challenge biological opinion on operation of federal reclamation project based on their economic interests in the project). Accordingly, Home Builders meet the lesser burden required for intervention. *See, e.g., Yniguez v. State of Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) (explaining that Article III standing requirements are "more stringent than those for intervention under rule 24(a)").

2. Home Builders' participation in the development of the AZPDES Program constitutes a sufficient interest to warrant intervention.

Home Builders have actively participated in the development of the AZPDES Program. Home Builders have advocated for the development of appropriate AZPDES legislation and administrative rules and for EPA's transfer of NPDES permitting authority to Arizona. *See* Lurie Declaration at ¶¶ 11-12, 14, 16-17. Home Builders assisted in the development of Arizona's Storm Water Construction General Permit, under which Home Builders' members will receive authorizations to discharge storm water in connection with their construction-related activities. *Id.* at ¶ 12, 15, 18-19; Wilhelm Declaration at

¶ 13-14. Such participation in the development of the AZPDES Program constitutes an interest warranting intervention. *See, e.g., Idaho Farm Bureau*, 58 F.3d at 1397 (public interest group entitled to intervene in action challenging measure it sponsored); *Washington State Bldg. and Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 629-630 (9th Cir. 1982), *cert. denied sub nom. Don't Waste Washington Legal Defense Found. v. Washington*, 461 U.S. 913 (1982) (public interest group that sponsored challenged initiative legislation entitled to intervene as of right under Rule 24(a)(2)); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (National Organization for Women entitled to intervene in action challenging procedures for ratification of the Equal Rights Amendment, which the organization had supported.).

3. Home Builders have an interest in receiving the benefits of State administration of the NPDES Program.

As discussed above, Congress intended to "recognize, preserve, and protect the primary responsibilities and rights of States" in administering the CWA. 33 U.S.C. § 1251(b). This Court recently explained that the CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Environmental Defense Center*, 319 F.3d at 414, *quoting Arkansas v. Oklahoma*, 503 U.S. 91, 1010 (1992). The CWA encourages states to "assume the major role in the operation of" the NPDES Program. *Boise Cascade*, 942 F.2d at 1430. Accordingly, EPA is required to approve state NPDES programs that satisfy the nine requirements specified in CWA § 402(b),

33 U.S.C. § 1342(b), and cannot attach conditions based on ESA concerns. *American Forest and Paper*, 137 F.3d at 297-298. Both the State of Arizona and EPA believe that the AZPDES, administered by ADEQ, will function more efficiently than the NPDES administered by EPA's San Francisco office:

> This move represents a win for Arizona citizens and businesses. The public benefits from our consolidated oversight of water pollution control activities, and businesses benefit from reduced permit costs. As a result of the agreement ***ADEQ will be in a much better position to issue timely permits and also to enforce laws that protect the quality of Arizona's water resources***.

EPA News Release, (Exhibit A).

In *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980), this Court held that farmers intending to purchase lands pursuant to the Reclamation Laws had a sufficiently protectable interest in receiving the benefits Congress intended they receive when it enacted those laws to intervene in an action seeking to force the Department of the Interior to develop an environmental impact statement prior to promulgating rules authorizing such sales. 622 F.2d at 438. The Court explained that the farmers were "precisely those Congress intended to protect with the reclamation acts and precisely those who will be injured if the Department of the Interior does not act expeditiously in accordance with the mandates of the reclamation acts and the [APA]." *Id.* Likewise, in this case, Home Builders' members are intended to benefit from Congress' objective of having the states administer the NPDES Program, as opposed to an EPA office located in another state. Home

Builders' members will be injured by any decision that overturns or otherwise clouds or delays the AZPDES Program. Projects will be delayed, permits may be pulled, and the home building industry will suffer. Lurie Declaration at ¶¶ 27-28.

4. Home Builders have a protectable interest in seeing Section 7 properly applied to EPA's decision.

In addition, Home Builders' members are also the intended beneficiaries of those provisions contained in Section 7(a)(2) and 50 C.F.R. Part 402 requiring use of the best scientific and commercial data available in conducting Section 7 consultations. *Bennett*, *supra*, 520 U.S. at 168 (explaining that this requirement protects the regulated community from "uneconomic (because erroneous) jeopardy determinations"). Home Builders have an interest in ensuring that Section 7 is properly applied in regard to EPA's transfer approval. Home Builders have a direct stake in the manner in which Section 7 applies to EPA's approval of Arizona's program and the manner in which FWS analyzes the effects of EPA's transfer because such analysis may impact the transfer itself. Indeed, Home Builders' members have suffered increased costs and unwarranted delay from erroneous and overzealous interpretations of the ESA in the past. Lurie Declaration at ¶ 24-26; Wilhelm Declaration at ¶¶ 7-8, 15.

5. Home Builders have a protectable interest in the NPDES Program under which Home Builders' members are regulated.

Home Builders' members have a direct interest in the manner in which the NPDES Program is administered (i.e., whether by EPA or ADEQ) because they are subject to regulation under that program. Most of Home Builders' members have or will attempt to obtain authorization to discharge storm water in connection with their projects, Lurie Declaration at ¶ 5, Wilhelm Declaration at ¶ 5-6. Home Builders, as the regulated community, have an interest in the manner in which such regulation takes place, and by whom. This is especially true when, as here, Home Builders' members will benefit from reduced compliance costs and fewer and shorter delays as a result of ADEQ's administration of the AZPDES. *See. e.g., Natural Resources Defense Council v. U.S.E.P.A.*, 966 F.2d 1292, 1297 (9th Cir. 1992) ("NRDC's allegations and the potential economic impact of the rules on the intervenors [various industry and trade groups subject to regulation under EPA's storm water rules] satisfy the broad standing requirement applicable here.").

6. Home Builders' interest will be impaired by disposition of this action in Home Builders' absence.

Impairment, "follows from the factors" related to Home Builders' protectable interest. *Sierra Club*, 955 F.2d at 1486. In granting the City of Phoenix leave to intervene in *Sierra Club*, this Court found the requisite impairment because the relief sought by the plaintiffs would have constrained EPA in a manner inconsistent with the City's interest in its permit and the operation of its wastewater

treatment plant. Specifically, the Court explained that EPA would be bound in later proceedings by any declaratory or injunctive relief granted. The City would be unable to later put at issue the proper scope of EPA's regulatory duties because the case at bar would "have controlling force on those issues." *Id.*

As in *Sierra Club,* if Defenders prevails on its instant challenge, Home Builders would be unable to later argue the merits of whether EPA properly approved the AZPDES Program. This *stare decisis* effect is sufficient to constitute the "practical impairment" of Home Builders' interests. *Id. See also Int'l Union*, 382 U.S. at 213. The practical effect of relief in this action, moreover, will be to undo the transfer of the NPDES Program, injuring Home Builders' and their members, who hold state permits authorizing discharges into waters of the United States.

7. Home Builders are not adequately represented by the parties.

In determining whether Home Builders' interests will be adequately represented by an existing party, this Court should consider (1) whether the interest of EPA is such that it will undoubtedly make all the intervenors' arguments; (2) whether EPA is capable and willing to make such arguments; and (3) whether Home Builders would offer any necessary elements to the proceedings that other parties would neglect. *Southwest Center*, 268 F.3d at 822. While Home Builders bears the initial burden of demonstrating that it is not adequately represented, that burden is minimal; Home Builders need only demonstrate that the existing parties' representation "*may be*" inadequate. *Id.*, 268 F.3d at 823, *citing Trbovich v.*

United Mine Workers, 404 U.S. 528, 538, n.10 (1972). Moreover, in assessing the adequacy of representation, this Court should focus on the subject of the action, not the particular issues before it at the time of this motion. *Id.*

In this case, as in *Southwest Center,* the interests of EPA and of Home Builders will likely diverge. *See* 268 F.3d at 823-824 ("The interests of government and the private sector may diverge. On some issues Applicants will have to express their own unique private perspectives. . . ."). Simply put:

> [w]e have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the . . . [intervenors], ***a task which is on its face impossible.***

National Farm Lines v. ICC, 564 F.2d 381, 384 (10th Cir. 1977) (emphasis added). Unlike any of the parties involved in this action, Home Builders' members actually rely on the authorizations to be afforded under the AZPDES Program and are the ***only*** parties before this Court directly affected by and regulated under the AZPDES Program. In addition, Home Builders participated in the program development process as representatives of the regulated community. Home Builders, moreover, if permitted to intervene in this case, will provide a unique perspective not otherwise offered any other party. EPA's defenses, for example, may be strongly influenced by internal agency policies and similar factors affecting their ability to fully and aggressively defend the AZPDES Program. Put simply, the regulated community's viewpoints are likely to diverge from those of the government.

8. Home Builders Have a Claim or Defense in Common with the Petition.

At a minimum, Home Builders have a "claim or defense and the main action have a question of law or a fact in common." *See* Rule 24(b), *Fed.R.Civ.P.* Under this relaxed standard, recently addressed by this Court in *Kootenai Tribe*, Home Builders clearly would be allowed to intervene. In *Kootenai Tribe*, the intervenors, proponents of the so-called "Roadless Rule" limiting road development on National Forests, moved to intervene in a suit filed by various opponents of the rule. The proposed intervenors' asserted interests related to the rule and, after intervention was granted, asserted defenses of the rule directly responsive to the claims for injunctive relief asserted by the plaintiffs. 313 F.3d at 1110-1111. In upholding the district court's grant of intervention, this Court explained:

> The intervenors asserted defenses of the Roadless Rule directly responsive to the claim for injunction. Moreover, though intervenors do not have a direct interest in the government rulemaking, they have asserted an interest in the use and enjoyment of roadless lands and in the conservation of roadless lands, in the national forest lands subject to the roadless rule, and they assert "defenses" of the government rulemaking that squarely respond to the challenges made by plaintiffs in the main action.

Id. Given such common questions, this Court held that Rule 24(b)'s common question of law or fact requirement had been satisfied and that intervention was warranted.

For the reasons explained above, Home Builders have a significant interest in the AZPDES Program, under

which their members' activities will be regulated. Like the intervenors in *Kootenai Tribe*, Home Builders advocated for and supported the development of the AZPDES Program, which Petitioners now challenge in this proceeding. Home Builders, if allowed to intervene, will assert that, based on *American Forest & Paper Ass'n*, Section 7 of the ESA does not apply to EPA's actions. Home Builders also will challenge directly Petitioners' standing as falling short of that required by the Supreme Court in *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 884-85 (1990), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) and *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997). Such defenses are directly responsive to the issues presented by the instant Petition and speak to the Court's ability to hear this case.

III. CONCLUSION

Home Builders have a protectable interest in seeing the AZPDES Program succeed. That interest is created by, recognized, and protected under the CWA. Home Builders were proponents of the program and actively participated in and supported its development. Their members are currently regulated under the AZPDES Program. Because the disposition of this case in Home Builders' absence may significantly impair such interests, Home Builders should be allowed to intervene in this action.

RESPECTFULLY SUBMITTED this 30th day of April, 2003.

FENNEMORE CRAIG

By /s/ Norman D. James
Norman D. James
Thomas R. Wilmoth
Attorneys for Intervenors
National Association of Home Builders; Southern Arizona Home Builders Association; Home Builders Association of Central Arizona

Certificate of Service

I certify that copies of **HOME BUILDERS' MOTION TO INTERVENE** has been served via first-class regular mail on the following:

Copy of the foregoing mailed
this 30th day of April, 2003, to:

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EXHIBIT A

[LOGO] *U.S. Environmental Protection Agency*

EPA Approves Arizona Pollutant Discharge Permits Program

For Immediate Release: December 5, 2002
Contact: Wendy Chavez, U.S. EPA, (415) 947-4248
Press Office Main Line: (415) 947-8700

Arizona Becomes the 45th State With Regulatory Authority

SAN FRANCISCO The U.S. Environmental Protection Agency today approved Arizona's application to administer and enforce the pollutant discharge permits program, under the federal Clean Water Act.

The move will give the Arizona Department of Environmental Quality the authority to regulate facilities and municipalities that discharge pollutants into surface waters of the United States.

The Arizona Pollutant Discharge Elimination System program permits contain limits on what can be discharged, monitoring and reporting requirements, and other provisions to ensure that water quality and human health are protected.

Currently, there are 200 permits of which approximately 40 are renewed annually.

"This move represents a win for Arizona citizens and businesses," said Karen Smith, director of ADEQ's Water Quality Division. "The public benefits from our consolidated oversight of water pollution control activities, and businesses benefit from reduced permit costs. As a result of this agreement, ADEQ will be in a much better

position to issue timely permits and also to enforce laws that protect the quality of Arizona's water resources."

"This approval puts the program in the hands of those most familiar with the environmental issues and the people of the state," said Wayne Nastri, the EPA's regional administrator for the Pacific Southwest region. "The EPA is confident that the state will do a great job administering the program and will continue to protect our precious water resources."

Prior to the shift, the EPA issued permits to all facilities that discharged pollutants to surface waters in Arizona. The new delegation authority allows the ADEQ to issue permits and take action on any violations within the state.

The agreement represents more than two years of work, which required the state to demonstrate to the EPA that it has sufficient legal authority and ability to implement and enforce the Arizona Pollutant Discharge Elimination System permit program.

ADEQ will continue to work closely with the EPA to ensure that the Clean Water Act requirements are met. The EPA will review draft permits prepared by the state, oversee program requirements and performance, review proposed changes to state laws and rules related to the program, as well as review compliance actions.

The Arizona permitting program will cover all areas within the state except for those in Indian country, where the EPA retains jurisdiction.

For more information on the Arizona wastewater discharge permit program delegation, visit the EPA Web site at: http://www.epa.gov/region09/water/npdes/arizona.html.

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners; v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, and NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, Applicants in Intervention.	Case No. 03-71439

DECLARATION OF ALAN LURIE

I, ALAN LURIE, declare and state under penalty of perjury as follows:

1. I am a resident of Pima County, Arizona, over 18 years of age, and have personal knowledge of the matters contained herein.

2. I am currently the Executive Vice-President of the Southern Arizona Home Builders Association ("SAHBA"). I have held this position since 1990. In such capacity, I am familiar with and have knowledge of the activities of SAHBA and its members. I am also familiar with, and have knowledge of, the home building and real estate development industry in southern Arizona.

3. SAHBA is a non-profit corporation organized under the laws of the State of Arizona. SAHBA was formed in 1953 to provide a vehicle for businesses in the housing and building trades industries in southern Arizona (including Pima, Cochise and Santa Cruz Counties) to address issues and concerns relating to those industries. SAHBA presently has approximately 675 member firms, which include real estate developers, homebuilders, contractors, consultants, title insurance companies and other businesses in southern Arizona involved in and dependent on the home building industry. These members employ in excess of 30,000 persons. SAHBA provides assistance to its members, as well as the building industry in general, by providing information, meeting with legislators and agencies, drafting and commenting on legislation and agency rules and, when necessary, participating in litigation in federal and state courts.

4. SAHBA is a member of the National Association of Home Builders ("NAHB"). NAHB is a national trade association consisting of more than 200,000 builder and associate members organized into more than 800 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. NAHB provides assistance to its members, like SAHBA, on various legislative, regulatory and legal matters affecting the home building and related industries throughout the country.

5. Home building and other construction activities in southern Arizona often involve authorization to discharge construction-related storm water into desert washes that are considered "waters of the United States" under Section 402 of the Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES"). Such authority has historically been granted by the United States Environmental Protection Agency ("EPA") through a regional office located in San Francisco, California. While SAHBA's members often disagree about the scope of EPA's jurisdiction to regulate such activities, especially when the receiving water is a desert wash, as a practical matter it is often more expeditious to obtain authorization than debate about EPA's jurisdictional reach. Thus, most developers in southern Arizona will obtain authorization in connection with their development if a desert wash exists on their property, a very common situation.

6. Because its members are affected by the manner in which the NPDES Program is administered, SAHBA has closely followed the actions of the EPA and the Arizona Department of Environmental Quality ("ADEQ") with respect to EPA's transfer of NPDES permitting and enforcement responsibility to Arizona and ADEQ's development of a State permitting program.

7. On December 5, 2002, EPA approved the State of Arizona's Pollutant Discharge Elimination System ("AZPDES") Program. ADEQ will now administer that program, and EPA will cease new permitting actions under the NPDES Program in Arizona. I do understand that there are some exceptions, which are immaterial to SAHBA.

8. Due to EPA's approval of the AZPDES Program, SAHBA's members who formerly obtained permits and authorizations through Region IX of the EPA in San Francisco, California will now be able to obtain those permits and authorizations directly from ADEQ under the AZPDES Program.

9. According to recent statements, both EPA and ADEQ believe that the AZPDES Program will be more efficiently run by ADEQ than by EPA. *See* EPA Press Release dated December 5, 2002, attached to the Home Builders' Motion to Intervene in this action as Exhibit A. I understand that part of the reason for this increased efficiency is the doubling of full time employees in Arizona devoted to administration of the AZPDES Program. I further understand this means ADEQ will have ten times as many employees available to administer the AZPDES Program as EPA has available to administer the NPDES Program in Arizona.

10. SAHBA and its members anticipate that the AZPDES Program will result in a more efficient program for regulating discharges associated with the construction-related activities in which its members engage. For example, if a compliance issue arises that requires a "face-to-face" meeting with regulators, SAHBA's members will no longer be required to travel to EPA's office in San Francisco. The meeting can be held in Phoenix with ADEQ. This should mean lower compliance costs and fewer and shorter project delays associated with permitting activities. SAHBA and its members, therefore, are very interested in seeing EPA's approval of the AZPDES Program upheld and that Program succeed.

11. For this reason, over the past two years, SAHBA representatives have directly participated in the development of the AZPDES Program and have supported EPA's decision to approve the AZPDES Program. SAHBA actively participated in the development of the AZPDES Program's substantive and procedural administrative rules, participated in the development of the Memorandum of Agreement between EPA and ADEQ that now governs administration of the AZPDES Program, and are assisted with the development of ADEQ's version of the Storm Water Construction General Permit ("CGP") authorizing certain discharges related to construction of residential developments. A brief history of SAHBA's efforts since 2001 is summarized below.

12. Beginning in early 2001, SAHBA participated in ADEQ's Construction Storm Water Working Group, which was part of ADEQ's stakeholder process in advance of its AZPDES Program rulemaking. The Working Group specifically addressed issues concerning the development of ADEQ's CGP designed to authorize construction-related storm water discharges.

13. In June 2001, SAHBA participated in ADEQ's Working Group regarding the development of a Memorandum of Agreement between EPA and ADEQ that now governs administration of the AZPDES program.

14. In July 2001, SAHBA participated in ADEQ's Working Group meetings regarding development of the AZPDES Program's implementation rules. On September 19, 2001, at a public hearing conducted by ADEQ in regard to the proposed AZPDES Program's rulemaking, SAHBA, through its attorneys, offered testimony in support of ADEQ's rulemaking efforts. In December 2001, SAHBA

attended a stakeholders meeting regarding AZPDES Program's rule development and the status of ADEQ's development of its own construction general permit.

15. On May 21, 2002, SAHBA co-authored and presented to ADEQ a proposed draft version of the AZPDES general permit for storm water discharges from construction activities.

16. On July 23, 2002, SAHBA provided ADEQ with written comments regarding appropriate AZPDES Program timeframes in response to ADEQ's Notice of Proposed Rulemaking regarding licensing time frames.

17. Representatives of SAHBA provided testimony expressing their support of ADEQ's application to obtain AZPDES Program approval from EPA during public hearings jointly conducted by ADEQ and EPA in September 2002. On September 13, 2002, SAHBA provided written comments publicly expressing its support of ADEQ's application to obtain AZPDES Program approval from EPA and suggestions for its effective implementation.

18. SAHBA has most recently been active in helping to develop the State's CGP. On December 17, 2002, for instance, SAHBA attended an informal meeting conducted by ADEQ at the Arizona Industrial Commission regarding the draft general permit, and on December 19, 2002 SAHBA provided ADEQ comments on the draft general permit.

19. The State's CGP was finalized on February 25, 2003. Many of SAHBA's members' activities qualify for coverage under the CGP, and a significant amount of the storm water discharges from construction projects

conducted by SAHBA's members are or will be authorized under the State's CGP.

20. In the absence of the CGP, SAHBA's members would be required to apply for individual permits to discharge under Section 402 of the Clean Water Act. Substantial delays would result if projects covered by the CGP were forced to obtain individual permits. SAHBA's members derive significant economic benefit from the application of the CGP in the form of reduced compliance costs and fewer project delays that would otherwise result from obtaining individual permits.

21. I have reviewed the petition filed by the Defenders of Wildlife ("Defenders") and others in this action and understand that Defenders is concerned with the manner in which the federal agencies have assessed the impacts of EPA's approval of the AZPDES Program on the cactus ferruginous pygmy-owl and other species protected under the Endangered Species Act ("ESA"). SAHBA has also been concerned with the manner in which such impacts are assessed.

22. The listing of the Arizona pygmy-owl population as an "endangered species" has resulted in the imposition of restrictions on land use and other requirements, such as extensive surveys in areas both within and outside of critical habitat, that are adversely affecting SAHBA's members in a number of different ways. In the background discussion in its final rule listing the Arizona pygmy-owl population as an "endangered," which was published in the Federal Register in March 1997, FWS specifically identified housing and development projects in the Tucson area as threats to the owl. Thus, FWS has specifically targeted residential housing projects and other real estate

development in the Tucson area by identifying those activities as a reason for considering the Arizona population of pygmy-owls to be "endangered."

23. SAHBA previously participated in litigation with FWS in connection with its listing of the pygmy-owl as an "endangered" species under the ESA and the subsequent designation of critical habitat for the pygmy-owl, along with the National Association of Home builders [sic] and the Home Builders Association of Central Arizona. SAHBA and the other Associations, who are also moving to intervene in this action, prevailed in their challenge to the original designation of critical habitat for the pygmy-owl. *Nat'l Ass'n of Home Builders, et at v. Babbitt et al.,* No. CV-00-0903-PHX-SRB (Order Sept. 21, 2001). The district court upheld FWS's decision to list the Arizona pygmy-owl population, however, and the Associations have appealed the district court's decision to this Court.

24. SAHBA members have historically and are currently experiencing substantial delays as a result of having to "consult" with FWS pursuant to Section 7 of the ESA in order to obtain permits under the Clean Water Act. The primary issue involved in most such consultations is the impact on the pygmy-owl. Under FWS's consultation handbook, the consultation's scope is not limited to the effect of the discharge authorized on the desert wash, but also extends to the effect of the entire development with which the discharge is associated. This means that, while the area directly affected by the discharge is very small, FWS's analysis may extend to thousands of acres of land outside the desert wash.

25. To my knowledge, the quality of the discharge and the ability to meet Clean Water Act requirements has never been an issue in these consultations; rather, it is the activity occurring outside the desert wash that is of most concern the FWS. SAHBA members frequently complain that FWS is imposing conditions and requirements as part of the consultation that dramatically change their project. I understand that FWS is severely limiting on-site clearing and land development activities and is also requiring the dedication of substantial amounts of off-site land as permanent pygmy-owl preserves to mitigate impacts. For example, members are being told by local FWS employees that they must develop at very low densities, such as one house per three acres of land, notwithstanding local zoning, which renders most residential subdivision projects uneconomical.

26. In short, FWS's decision to list the pygmy-owl and to designate critical habitat for that species has greatly complicated the process by which the NPDES Program is administered in Arizona. Federal agencies have been "consulting" on the effects of activities authorized under the NPDES Program on the pygmy-owl in areas where pygmy-owls have not been documented and in areas that have not been designated as critical habitat in accordance with the ESA.

27. Reversal of the EPA's transfer decision would cause severe injuries to members of SAHBA as well as the Pima County real estate industry generally. It would deny SAHBA members the benefit of streamlined Clean Water Act compliance and the convenience of working with local authorities rather than faceless bureaucracies in San Francisco. It might also result in the invalidation of permits and authorizations for projects already authorized, which

may halt the projects indefinitely and, ultimately, cause serious injury to landowners and developers, who have already invested considerable resources to construct roads, utilities and other improvements.

28. Many other persons will be injured if the EPA's decision is overturned. For example, in some cases, portions of the affected projects have been purchased by builders, who have already commenced home construction, while in other cases the developer (who is also the builder) has built and sold homes. Thus, in some of these projects, individuals have already purchased homes or improved lots intending to build homes. Reversal of EPA's transfer decision may cause all work in these projects to halt, jeopardizing the continued viability of the projects and injuring individuals who were not involved in the permitting process. Project delays will force contractors and subcontractors to cease work, resulting in temporary layoffs and similar problems. Project delays and work stoppages will have other adverse impacts, such as a decline in the purchase of building supplies and materials. Moreover, state and local governments will lose revenues in the form of reduced sales taxes and, ultimately, property taxes as a result of project delays and work stoppages. While it is difficult to quantify these financial impacts, they will certainly occur.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2003, in Tucson, Arizona.

/s/ Alan P. Lurie
ALAN LURIE

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent, and NATIONAL ASSOCIATION OF HOME BUILDERS, SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION, AND HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, Applicants in Intervention.	Case No. 03-71439

DECLARATION OF CONNIE WILHELM

I, CONNIE WILHELM, declare and state under penalty of perjury as follows:

1. I am a resident of Maricopa County, Arizona, over 18 years of age, and have personal knowledge of the matters contained herein.

2. I am currently the President and the Executive Director of the Home Builders Association of Central

Arizona ("HBACA"). I have held these positions since 1988. In such capacity, I am familiar with and have knowledge of the activities of HBACA and its members, as well as the home building industry in central Arizona generally.

3. HBACA is a non-profit corporation organized under the laws of the State of Arizona. HBACA was formed in 1951 to provide a vehicle for businesses in the housing and real estate development industries in central Arizona (including Maricopa and Pinal Counties) to address issues and concerns relating to those industries. HBACA presently has approximately 850 members, which include real estate developers, home builders, subcontractors, banks, utilities, title and mortgage insurance companies and other businesses in central Arizona involved in and dependent on the home building industry. HBACA provides assistance to its members, as well as the building industry in general, by providing information, reducing costs caused by regulation, taxes and other governmental actions, meeting with legislators and agencies, drafting and commenting on legislation and agency rules and, when necessary, participating in litigation in federal and state courts.

4. HBACA is a member of the National Association of Home Builders ("NAHB"). NAHB is a national trade association consisting of more than 200,000 builder and associate members organized into more than 800 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. NAHB provides assistance to its members, like HBACA, on various legislative, regulatory and legal matters affecting the home building and related industries throughout the country.

5. Home building and other construction activities in central Arizona often involve authorization to discharge construction-related storm water into desert washes that are considered "waters of the United States" under Section 402 of the Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES"). Such authority has historically been granted by the U.S. Environmental Protection Agency ("EPA") through a regional office located in San Francisco, California. These authorizations provide what FWS refers to as a "federal nexus," requiring compliance with Section 7 of the Endangered Species Act ("ESA"), which in turn may require "consultation" with the U.S. Fish & Wildlife Service ("FWS").

6. While HBACA's members often disagree about the scope of EPA's jurisdiction to regulate such activities, especially when the receiving water is a dry desert wash, as a practical matter it is often more expeditious to obtain authorization than debate about EPA's jurisdictional reach. Thus, most developers in central Arizona will obtain authorization in connection with their development if a desert wash exists on their property, and thereby create a federal nexus for Section 7 purposes.

7. HBACA and its members have closely followed the listing of the Arizona population of the cactus ferruginous pygmy-owl as an "endangered" species under the ESA in 1997 and FWS's continuing efforts to re-designate critical habitat for that population of owls. Despite the fact that pygmy-owls have not occupied lands north of the Gila River for at least 30 years, and the fact that the areas in which HBACA members conduct the majority of their real estate projects have not been identified as containing the key features of pygmy-owl habitat, FWS continues to place onerous requirements on HBACA's members, who need

NPDES authorizations in connection with their construction activities.

8. It is common that, as a result of "negotiations" with FWS and EPA concerning the impacts of storm water discharges on the pygmy-owl, major project modifications are required to accommodate the species (even if it has not been detected on the project), and thereby avoid having to go through formal Section 7 consultation to obtain NPDES authorization. Such modifications are often memorialized in recorded easements or covenants, conditions and restrictions and are, therefore, binding on the property forever.

9. HBACA is participating in litigation with FWS in connection with its listing of the Arizona pygmy-owl population as an "endangered species" under the ESA and the subsequent designation of critical habitat for that population. HBACA, along with the other Associations moving to intervene in this action, prevailed in their challenge to the designation of critical habitat for the pygmy-owl before Judge Susan Bolton. *Nat'l Ass'n of Home Builders, et al. v. Babbitt et al.*, No. CV-00-0903-PHX-SRB (Order Sept. 21, 2001). The district court upheld FWS's decision to list the Arizona pygmy-owl population, which decision is now on appeal before this Court.

10. Because its members are affected by the manner in which the NPDES Program is administered, HBACA has closely followed the actions of the EPA and the Arizona Department of Environmental Quality ("ADEQ") with respect to EPA's transfer of NPDES permitting and enforcement responsibility to Arizona.

11. On December 5, 2002, EPA approved the State of Arizona's Pollutant Discharge Elimination System

("AZPDES") Program. ADEQ will now administer that program, and EPA will cease new permitting actions under the NPDES Program in Arizona. I do understand that there are some exceptions, which are immaterial to HBACA. Due to EPA's approval of the AZPDES Program, HBACA's members who formerly obtained permits and authorizations through Region IX of the EPA in San Francisco, California will now be able to obtain those permits and authorizations directly from ADEQ under the AZPDES. HBACA and its members anticipate that the AZPDES will result in a more efficient program for regulating discharges associated with the construction-related activities in which its members engage with lower compliance costs and fewer and shorter project delays associated with permitting activities. HBACA and its members, therefore, are very interested in seeing the AZPDES Program upheld and that program succeed.

12. For this reason, over the past two years, HBACA representatives have directly participated in the development of the AZPDES Program and have supported EPA's decision to approve the AZPDES Program. HBACA actively participated in the development of the AZPDES Program's substantive and procedural administrative rules and in the development of the Memorandum of Agreement between EPA and ADEQ that governs the administration of the AZPDES Program, and HBACA assisted with the development of ADEQ's version of the construction general permit ("CGP"). A brief history of HBACA's efforts since 2001 is summarized below.

13. In early 2001, HBACA began participating in ADEQ's Construction Storm Water Working Group. In June 2001, HBACA participated in ADEQ's Working Group regarding the development of a Memorandum of

Agreement between EPA and ADEQ that now governs administration of the AZPDES. In July 2001, HBACA participated in ADEQ's Working Group meetings regarding development of the AZPDES implementation rules. In September 2002, HBACA provided written comments publicly expressing its support of ADEQ's attempts to obtain AZPDES approval from EPA and suggestions for its effective implementation.

14. HBACA has most-recently been active in helping to develop the State's CGP. HBACA previously co-authored and presented to ADEQ a proposed draft version of the AZPDES general permit for large and small construction activity. On December 17, 2002, HBACA attended an informal hearing conducted by ADEQ at the Arizona Industrial Commission regarding the general permit, and on December 19, 2002, HBACA provided ADEQ comments on the draft general permit.

15. I have reviewed the petition filed by the Defenders of Wildlife and other plaintiffs in this action ("Defenders") and understand that Defenders objects to the manner in which the federal agencies have assessed the impacts of EPA's approval of the AZPDES on the pygmy-owl and other species listed under the ESA. For the reasons discussed above, HBACA has also been concerned with the manner in which such impacts are assessed.

16. HBACA and its members will benefit from EPA's transfer of NPDES permitting authority to ADEQ, which is why we have devoted substantial time and effort in supporting the transfer. ADEQ's administration of the AZPDES Program promises to be more efficient and will not involve the delays and communication problems often experienced when dealing with EPA's San Francisco office.

If EPA's decision to approve the AZPDES is overturned, the progress we have made during the past two years in developing the AZPDES Program and obtaining approval from EPA will be for naught. Because of the obvious benefits to our members and the amount of effort spent to develop the AZPDES Program, HBACA wants to insure that the AZPDES Program is successful and survives legal challenges, such as those brought by Defenders in this action

17. Finally, I understand that the NPDES Program cannot simply be "given back" to EPA if the AZPDES Program is invalidated due to the provisions of the CWA. There is, therefore, concern among HBACA's members as to what will become of the NPDES permitting program in Arizona if the EPA's decision to approve the AZPDES Program is overturned. It is unclear when, how, if, or by whom authority will be granted under the CWA for our members' development activities in that event.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 27, 2003, in Phoenix, Arizona.

/s/ Connie Wilhelm
Connie Wilhelm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEFENDERS OF WILDLIFE, et.al., Plaintiffs, vs. LT. GENERAL ROBERT B. FLOWERS, et.al., Defendants.	No. CIV 02-195-TUC-CKJ **ORDER** (Filed Jul. 17, 2003)

As set forth below, consistent with this Court's June 2, 2003 Order (Doc. # 151), this Court hereby severs Claim 7 of Plaintiffs' Second Amended Complaint and transfers it to the United States Court of Appeals for the Ninth Circuit.

Procedural Background

On June 2, 2003, this Court found that it lacks subject matter jurisdiction over Claim 7 of Plaintiffs' Second Amended Complaint – i.e., Plaintiffs' challenge to the United States Fish and Wildlife Service's issuance of a December 3, 2002 Biological Opinion on the Effects of the Environmental Protection Agency's Transfer of its National Pollutant Discharge Elimination System program for Arizona to the State of Arizona – as the United States Court of Appeals for the Ninth Circuit has exclusive jurisdiction over this challenge. *See* Doc. # 151. Furthermore, it indicated its intent to sever Claim 7, pursuant to Rule 21, Fed. R. Civ. P., and transfer it to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1631. However, it granted the

parties and interested intervenors the opportunity to advise this Court if they wished to proceed in a different manner with respect to Claim 7. The Court is now in receipt of memorandums from Plaintiffs Defenders of Wildlife and the Center for Biological Diversity ("Defenders"), the United States Fish and Wildlife Service ("USFWS"), and the intervenors National Association of Home Builders, Southern Arizona Home Builders Association, and Home Builders Association of Central Arizona (collectively, "Home Builders"). No response was filed by intervenor State of Arizona nor intervenors Saguaro Ranch Investments LLC and Saguaro Ranch Development Corporation ("Saguaro Ranch").

In their response, Defenders indicated their desire to have Claim 7 adjudicated on the merits as expeditiously as possible. As such, they recommended that (1) if the USFWS represents to this Court that it will not object to the transfer of Claim 7 to the Ninth Circuit pursuant to 28 U.S.C. § 1631 and it will not argue that the Ninth Circuit lacks jurisdiction to dispose of Claim 7 on the merits, this Court should sever and transfer Claim 7, and (2) if the USFWS opposes transfer and states that it will object to the Ninth Circuit asserting jurisdiction over and rendering a decision on the merits of Claim 7, this Court should dismiss Claim 7 without prejudice while authorizing an immediate appeal under Rule 54(b), Fed. R. Civ. P.

In their response, Home Builders argue that this Court put the proverbial cart-before-the-horse by not first addressing their Article III standing argument. Relying on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) and *Scott v. Pasadena Unified School District*, 306 F.3d 646, 654 (9th Cir. 2002), Home Builders argue that this Court must always consider an Article III standing

issue before addressing other jurisdictional issues or the merits of the case. They then, in great and expansive detail, rehash their standing arguments set forth in their previous briefs.

In its response, the USFWS notes that while it agrees that Court's June 2, 2003 Order is supported by Ninth Circuit case law, it recently realized that it had failed to raise a jurisdictional defect in its extensive briefing on Claim 7. Namely, the USFWS now argues that its December 3, 2002 Biological Opinion on the Effects of the Environmental Protection Agency's Transfer of its National Pollutant Discharge Elimination System program for Arizona to the State of Arizona (the "Transfer BO") is not a final agency action and is, thus, neither reviewable by this Court nor the Ninth Circuit. Thus, it requests that this Court dismiss Claim 7 with prejudice and enter Rule 54(b) language. USFWS's new-found argument is essentially that a biological opinion without an accompanying incidental take statement, like the Transfer BO in this case, does not carry the legal effect that the United States Supreme Court found dispositive in *Bennett v. Spear*, 520 U.S. 154 (1997). However, the USFWS also argues that if this Court finds that the Transfer BO is a reviewable final agency action, this Court should sever and transfer Claim 7.

Discussion

As an initial matter, the Court notes that the combination of Rule 21, Fed. R. Civ. P.,[1] and 28 U.S.C.

[1] Rule 21, Fed. R. Civ. P., provides that "[a]ny claim against a party may be severed and proceeded with separately."

§ 1631[2] allows this Court to sever and transfer Claim 7 to the Ninth Circuit while retaining jurisdiction over the remaining counts in Defenders' Second Amended Complaint. *See, e.g., United State* [sic] *v. County of Cook, Illinois*, 170 F.3d 1084, 1087-89 (Fed. Cir. 1999) *and Federal Deposit Ins. Corp. v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996).

Nonetheless, a case may be transferred under Section 1631 only when "(1) a court exists in which the case could have been brought originally, and (2) the interests of justice would be served by the transfer." *Clark v. Busey*, 959 F.2d 808, 812 (1992). In addition, a court must consider whether the action would have been timely filed if it had been filed in the proper forum on the date filed. *See Taylor v. Social Security Adm.*, 842 F.2d 232, 233 (9th Cir. 1988). Thus, "[t]ransfer is improper where the transferee court lacks jurisdiction and thus could not have originally heard the suit" because "Section 1631 does not itself establish jurisdiction, but rather corrects lack of jurisdiction only in cases that are actually transferred or are at least transferable." *Clark*, 959 F.2d at 812. *See also*

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[2] 28 U.S.C. § 1631 provides as follows:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Id.

Hose v. Immigration and Naturalization Serv., 180 F.3d 992, 996 (9th Cir. 1999). In addition, "[t]ransfer is also improper where the plaintiff fails to make a prima facie showing of a right to relief, because the interests of justice would not be served by transfer of such a case." *Clark*, 959 F.2d at 812.

Addressing the relevant factors, the Court reaffirms its June 2, 2003 Order (Doc. # 151) in which it found that jurisdiction over Claim 7 is proper *exclusively* in the Ninth Circuit in light of 33 U.S.C. § 1369(b)(1)(D), *Public Utility Comm'r of Oregon v. Bonneville Power Admin*, 767 F.2d 622, 626 (Cir. 1985), and the facts of this particular challenge. Furthermore, this challenge would have been timely filed if it had been filed in the proper forum on the date filed. *See, e.g.*, 28 U.S.C. § 2401(a) (providing a six-year statute of limitations) *and Alsea Valley Alliance v. Evans*, 161 F.Supp.2d 1154, 1160-61 (D. Ore. 2001). Thus, this Court must address whether a transfer would be in the interests of justice and particularly the jurisdictional issues raised by the USFWS and the Home Builders.

With respect to Home Builders' jurisdictional arguments, the Court finds that they misread the relevant cases as neither *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) nor *Scott v. Pasadena Unified School District*, 306 F.3d 646, 654 (9th Cir. 2002) require a federal court to consider an Article III standing issue before addressing other jurisdictional issues. Rather, those cases merely indicate that a federal court must establish its *jurisdiction* before proceeding to the *merits* of a case. *See Steel Co.*, 523 U.S. at 101, *and Scott*, 306 F.3d at 653-54. In fact, the United States Supreme Court in *Steel* Co. recognized that a statutory standing question may be resolved *before* an Article III standing issue. *See Steel Co.*,

523 U.S. at 97 n.2. *See also, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-85 (1999) *and ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1140 (9th Cir. 1998) (noting that a decision of statutory standing may take priority over an issue of Article III standing). Thus, Home Builders' argument that a federal court *must* consider an Article III standing issue before addressing other jurisdictional issues is flatly wrong.

In this matter, this Court has not transgressed the dictates of either *Steel Co.* nor *Scott* in addressing first whether the Ninth Circuit is vested by Congress with exclusive jurisdiction to decide Claim 7. Rather, it has followed the binding cases and addressed a serious and substantial jurisdictional argument, which even the USFWS did not advocate by the time of oral arguments on Claim 7, and it has *not* addressed the merits of Claim 7. Rather, this Court's decision helps promote the underlying purpose of *Steel Co.* As the Supreme Court stated, "[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co.*, 523 U.S. at 101. Both Congress and the Ninth Circuit have laid down limits on this Court's jurisdiction, which this Court must strictly observe, and Claim 7 is undoubtably [sic] beyond those limits.

Nonetheless, Home Builders' standing arguments may have some bearing with respect to whether a transfer under Section 1631 would be appropriate. After reviewing Home Builders' standing arguments, the Court notes that many, if not all, of these arguments are similar to standing arguments that could be made against Defenders'

challenge to the Environmental Protection Agency's ("EPA") approval of the State of Arizona's application to administer and enforce the NPDES program for Arizona which is currently pending before the Ninth Circuit. In addition, in reviewing the Ninth Circuit's docket on Defenders' challenge against the EPA (*see Defenders of Wildlife v. United States Environmental Protection Agency*, Ninth Circuit Case # 03-71439), the Court finds that the National Association of Home Builders has been granted leave to intervene in that challenge. Thus, this Court readily expects that either the Home Builders will raise or that the Ninth Circuit will *sua sponte* consider similar standing issues with respect to the EPA challenge. *See e.g.*, *Steel Co.*, 523 U.S. at 97 (noting that a court can raise jurisdictional issues *sua sponte*). Considering the fact that the Ninth Circuit has *exclusive jurisdiction* over this challenge to the Transfer BO and would have decided the Article III standing issues as a matter of first impression if Defenders had properly filed this claim in that court, and considering the potential of duplication and inconsistent results on the standing issues (*see, e.g.*, June 2, 2003 Order (Doc. # 151), p. 940), the Court believes it appropriate to allow the Ninth Circuit to address these issues as a matter of first impression. Nonetheless, at the very least, the Court finds that Defenders' standing arguments are not "sure losers." *See, e.g., Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999). Thus, this Court believes that it would be in the interest of justice to transfer Claim 7 to the Ninth Circuit without resolving the Article III standing issues raised by Home Builders.

With respect to the USFWS' jurisdictional argument that a biological opinion without an accompanying incidental take statement, like the Transfer BO in this

case, does not carry the legal effect that the United States Supreme Court found dispositive in *Bennett v. Spear*, 520 U.S. 154 (1997), the Court also finds that Defenders' position is also not a "sure loser." *See Cascadia Wildlands Project v. U.S. Fish & Wildlife Serv.*, 219 F.Supp.2d 1142, 1147-48 (D. Ore. 2002) citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Pacific Coast Fed'n of Fishermen's Assoc., Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028 (9th Cir. 2001). *See also* USFWS' June 30, 2003 Response (Doc. # 170) at 1 n.2 ("In Plaintiffs' lawsuit against EPA in the Ninth Circuit, judicial review may properly include a review of the reasonableness of EPA's reliance on the analysis and recommendation of FWS' Biological Opinion in order to determine whether EPA fulfilled its obligations under § 7(a)(2) with respect to the approval of the Arizona program."). Thus, similarly, this Court believes that it would be in the interest of justice to transfer Claim 7 to the Ninth Circuit without resolving the statutory standing issue raised by the USFWS.

Finally, taking an obligatory peek at the merits of Defenders' Claim 7, the Court does not believe that Claim 7 is a "sure loser" such that a transfer would not be in the interests of justice. *See, e.g., Phillips*, 173 F.3d at 611 *and Clark*, 959 F.2d at 812. As such, the Court believes that a transfer of Claim 7 to the Ninth Circuit would be in the interests of justice. Accordingly, the Court finds that it is appropriate to sever Claim 7, pursuant to Rule 21, Fed. R. Civ. P., and transfer that claim to the Ninth Circuit, pursuant to 28 U.S.C. § 1631, while retaining jurisdiction in this Court over Defenders' remaining claims.

Conclusion

Accordingly, IT IS HEREBY ORDERED that:

1. Claim 7 of Plaintiffs' Second Amended Complaint is SEVERED from Plaintiffs' remaining claims, and TRANSFERRED to the United States Court of Appeals for the Ninth Circuit;

2. The Clerk of the Court SHALL FORWARD a copy of this Order, this Court's June 2, 2003 Order (Doc. # 151), and a copy of Plaintiffs' Second Amended Complaint (Doc. # 42) to the Ninth Circuit;

3. The Ninth Circuit is ADVISED that this matter is a related case to the pending matter *of Defenders of Wildlife v. United States Environmental Protection Agency*, Ninth Circuit Case # 03-71439; and

4. If any party or intervenor wishes additional portions of this Courts record to be forwarded to the Ninth Circuit, it shall prepare a motion and/or stipulation along with a proposed form of order that clearly indicates which *specific* portions of the record it wishes forwarded to the Ninth Circuit. Such motion and/or stipulation along with a proposed form of order shall be submitted to the Court within ten (10) business days of the entry of this Order.

DATED this 15th day of July, 2003.

/s/ Cindy K. Jorgenson
CINDY K. JORGENSON
United States District Judge

[SEAL] **U.S. Department of Justice**
Environment and Natural Resources Division

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July 27, 2005

By Overnight Delivery

Ms. Cathy A. Catterson
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street,
San Francisco, CA 94119-1526

Re: Nos. 03-71439, 03-72894; *Defenders of Wildlife v. Environmental Protection Agency*

Dear Ms. Catterson:

On July 26, 2005, Respondents received Petitioners' letter regarding supplemental authority regarding this Court's recent decision in *Washington Toxics Coalition v. Environmental Protection Agency,* 2005 U.S. App. Lexis 12898, June 29, 2005. The issue discussed by Petitioner regarding whether or not the United States Environmental Protection Agency ("EPA") has an obligation to consult regarding its approval of the State of Arizona's Clean Water Act ("CWA") 402 Permitting Program is not before the Court in this case. In *Defenders of Wildlife v. Environmental Protection Agency,* EPA did consult. The only issue before this Court is the adequacy of that consultation. For the same reason, the Court should not reach the question regarding whether the EPA has sufficient discretion to trigger

consultation regarding the approval of the transfer of 402 permitting authority to the State. If the Court were to believe that it is necessary to resolve the "discretion" issue, Respondents reiterate their request at oral argument for an opportunity to provide the Government's views on that issue.

Thank you for your assistance in providing this response to the above-captioned panel.

Very truly yours,

/s/ Robert L. Gulley
Robert L. Gulley

cc: Counsel of Record

[SEAL] **U.S. Department of Justice**

Environment and Natural Resources Division

Wildlife and Marine Resources Section
P.O. Box 7369
Ben Franklin Station
Washington, DC 20044-7369
[Telephone Numbers Omitted In Printing]

August 4, 2005

By Overnight Delivery

Ms. Cathy A. Catterson
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street,
San Francisco, CA, 94119-1526

Re: Nos. 03-71439, 03-72894; *Defenders of Wildlife v. Environmental Protection Agency*

Dear Ms. Catterson:

I am writing with respect to the above-captioned matter to provide the panel with the following supplemental information. On August 3, 2005, the United States Fish and Wildlife Service published in the Federal Register a proposed rule to delist the pygmy owl. Endangered and Threatened Wildlife and Plants; Proposed Rule To Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-Owl From the Federal List of Endangered and Threatened Wildlife; Proposal To Withdraw the Proposed Rule To Designate Critical Habitat, 70 Fed. Reg. 44547-01 (Aug. 3, 2005). The pygmy owl is the species of primary concern in this case.

Thank you for your assistance in providing this response to the above-captioned panel.

Very truly yours,

/s/ Robert L. Gulley
Robert L. Gulley

cc: Counsel of Record

[SEAL] **U.S. Department of Justice**

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August 4, 2005

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Ms. Cathy A. Catterson
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street,
San Francisco, CA 94119-1526

Re: Nos. 03-71439, 03-72894; *Defenders of Wildlife v. Environmental Protection Agency*

Dear Ms. Catterson:

On July 15, 2005, Petitioners notified the Court of supplemental authority regarding this Court's recent decision in *Washington Toxics Coalition v. Environmental Protection Agency,* 2005 U.S. App. Lexis 12898, June 29, 2005. Respondents and Intervenor-Defendants filed their responses as allowed by CR 28(j). On August 1, 2005, Petitioners filed a reply to the Intervenor-Defendants response. Such replies are not allowed by CR 28(j) or any other Circuit Rule. Accordingly, such a reply should be ignored by the Court. To the extent that the Court is going to consider Petitioners' reply, Respondents again emphasize that the issue of whether or not the United States Environmental Protection Agency ("EPA") can properly rely on 50 C.F.R. § 402.03 in deciding whether or not it must consult regarding its approval of the State of

Arizona's Clean Water Act 402 Permitting Program is not before the Court in this case because EPA did consult regarding the approval of the program.

Thank you for your assistance in providing this response to the above-captioned panel.

Very truly yours,

/s/ Robert L. Gulley
Robert L. Gulley

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Ms. Karen Smith
Director, Water Quality Division
Arizona Department of Environmental Quality
1110 W. Washington
Phoenix, AZ 85007

Re: Statutory Deadline for Arizona NPDES Program Submission

Dear Ms. Smith:

This letter summarizes the discussions between ADEQ and EPA staff regarding the starting date of EPA's 90 day review of Arizona's NPDES program submission. During these discussions EPA and ADEQ agreed that the appropriate start date was July 10, 2002 when EPA received the final supplement to Arizona's NPDES program application. Therefore, EPA and ADEQ are in agreement that EPA's deadline for taking action on Arizona's submission is October 8, 2002. We look forward to continue working with you during the review process.

Sincerely,

/s/ Alexis Strauss
Alexis Strauss, Director
Water Division 17 Sept. 2002

[Image Omitted In Printing]

Michael Horton
10/15/2003 02:30 PM

To: Susan MacMullin/RO/R2/FWS/DOI@FWS

cc:

Subject: indirect effects

— Forwarded by Michael Horton/ARL/R0/FWS/DOI on 10/15/2003 04:30 PM —

Sherry Barrett
07/25/2002 08:04 PM

To: Michael Horton/ARL/R9/FWS/DOI@FWS

cc: Cindy Schultz/R0/R2/FWS/DOI@FWS

Subject: indirect effects

Michael:

1. We are hearing from EPA that we don't need to address the indirect effects of their delegation of the NPDES permit program to the State of AZ because we can still address effects through section 9. However, one of our species of concern is a plant (Pima pineapple cactus) and the other is the pygmy-owl. For the latter, we only have a handful left, and, therefore, section 9 doesn't play well Section 9 is simply not equivalent to the threshold of "may adversely affect." The Congressional language speaks to the fact that the burdon [sic] of the ESA is on the shoulders of the Feds, not the private landowners.

2. "Caused by" and "but for" are not the same. The former regards an effect that is caused by an action. With the latter, we're looking to see if there was another

potential cause for an action. If there is not, then it is an interrelated or interdependent action.

Sherry
Michael Horton

[Image Omitted In Printing]

Michael Horton
07/23/2002 01:57 PM

To: Larry Salata, David Wright, Alison Willy@FWS, Cindy Schultz@FWS, Sherry Barrett@FWS, Jennifer Szymanski@FWS, Glenn Smith, Steve Spangle@FWS

cc:

Subject:

One thing is clear from my request for help: there is a basic lack of understanding throughout the Service as to what indirect effect are.

While I got some good examples of indirect effects and a subset of these made good points about how using the "but for" test would create a problem for us, none of them resulted in a slap you in the face "that's outrageous" result. Here's what I need: a solid response for the argument that if we remove the indirect effects from the action agency by utilizing the "but for" test, that it doesn't really matter because the nonFederal entity still has the section 9 prohibition.

Several ground-rules:

(1) Yes, the "but for" test is only used within the preamble to identify interrelated and interdependent actions, however, the lawyers feel that this is also the test that should be used to identify causation;

(2) We can't use the argument that we just don't enforce section 9 or that it's much harder to make a section 9 case than it is to address the effects in section 7 (this is what they're banking on);

(3) In her email message Sherry stated that she believes that if you receive Federal funding/assistance/permits, etc. this comes with the baggage of Federal laws and responsibilities meant to protect the environment, regardless of whether there is another way to do it. This argument rings true to me. Though I don't want to limit our approach to just one argument, I'd like to develop this argument further with any other examples that people can think of where this is true (they don't have to be limited to environmental laws or constraints) and any other thoughts we can role [sic] into it (e.g., section 7 is designed to keep the Federal government from participating in actions that lead to the demise of the species).

If we can't figure out a solid response for this argument, I think we'll lose indirect effects as we know them.

Thanks for your time and any ideas you can provide,

Mike

P.S. – If there's anyone else who might have some good insights, please feel free to forward this on.

United States Department of the Interior
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 242-0210 FAX: (602) 242-2513

In Reply Refer To:
02-21-02-F-0268 November 27, 2002

Mr. Terry Oda
Clean Water Act Standards and Permits Office (WTR-5)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

Dear Mr. Oda:

As discussed in conversation between our respective staffs, the U.S. Fish and Wildlife Service, Arizona Ecological Services Office, is transmitting the enclosed revised draft biological opinion on the transfer of the National Pollutant Discharge Elimination Program (NPDES) to the State of Arizona. We will finalize the document after you have notified us that you have reviewed it and there are no errors and no need for further clarification.

We encourage you to coordinate the review of this project with the Arizona Department of Environmental Quality (ADEQ) and the Arizona Game and Fish Department (cc without enclosure: John Kennedy, Habitat Branch). However, please note that draft documents generated under the ESA section 7 consultation process are generally not released until after a final biological opinion has been issued, so as not to discourage frank discussion between the parties involved [Freedom of Information Act (FOIA), exemption 5]. If the Environmental Protection Agency (EPA) chooses to release this draft biological opinion to non-Federal parties, it may become part of the public

record and may no longer be determined to be exempt from FOIA.

We have addressed EPA's comments on the first draft Biological Opinion (BO). First, the draft BO now provides a clear summary of the information on which the opinion is based. See paragraph two, page one for the inserted text. Second, regarding 50 CFR 402.14(h)(2) and (h)(3), we have adequately summarized the effects of the action on listed species and critical habitat. Due to the legal complexity of this opinion, much of the biological information has been referenced at our website: http:// arizonaes.fws.gov. We also believe that the biological effects of this action will be minimal due to the administrative nature of the proposed action. We have amended our effects section to describe why we believe there are minimal biological effects in this action and to explain our position more clearly. Third, we have added a detailed discussion of the proposed action which provides a more detailed explanation of the basis of our conclusion. Fourth, we have added clarification to our opinion at EPA's request that the species and critical habitats under consideration in this consultation are those that are in, adjacent to, or dependent on surface waters in Arizona. We emphasize that in EPA's Biological Evaluation, you concluded that all listed species and critical habitat in Arizona are in, adjacent to, or dependent on surface waters in Arizona. We have also more clearly described how to access our website and obtain more species and critical habitat information. Fifth, we have added language throughout the opinion discussing critical habitat, so as not to infer that we are only analyzing the effects of the action on listed species alone. Sixth, we have moved our discussion from the introduction section to the

consultation history. We also kept the language discussing the issue of funding ADEQ's NPDES program for the next three years.

Most of EPA's specific comments were addressed directly and changed as EPA suggested. The 'Conservation Measures' section was replaced by more detailed language in the description of the proposed action.

If we can be of further assistance, please contact Carrie Marr (x214) or Debra Bills (x239).

Sincerely,

/s/ Steven L. Spangle
Steven L. Spangle
Field Supervisor

Enclosure

cc with enclosure:
Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Assistant Field Supervisor, Ecological Services, Tucson, AZ

without enclosure:
Karen Smith, Water Division, Arizona Department of Environmental Quality, Phoenix, AZ
John Kennedy, Habitat Branch, Arizona Game and Fish Department, Phoenix, AZ

W:\Carrie Marr\az npdes bo\azpdestransmittal2.wpd

Nos. 06-340 and 06-549

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS

v.

DEFENDERS OF WILDLIFE, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER ENVIRONMENTAL PROTECTION AGENCY

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JULIE K. WALTERS
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Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), which requires each federal agency to insure that its actions are not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

2. Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, see 33 U.S.C. 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2); and, if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2).

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In the Supreme Court of the United States

No. 06-340

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS

v.

DEFENDERS OF WILDLIFE, ET AL.

No. 06-549

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER ENVIRONMENTAL PROTECTION AGENCY

OPINION BELOW

The opinion of the court of appeals (06-549 Pet. App. 1a-67a) is reported at 420 F.3d 946.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2005. Petitions for rehearing were denied on June 8, 2006 (06-549 Pet. App. 68a-69a). The petition for a writ of certiorari in No. 06-340 was filed on September 6, 2006. On August 30, 2006, Justice Kennedy extended

the time for the Environmental Protection Agency (EPA) to file a petition for a writ of certiorari to and including October 6, 2006. On September 27, 2006, Justice Kennedy further extended the EPA's time to October 23, 2006, and the petition for a writ of certiorari in No. 06-549 was filed on that day. The petitions were granted on January 5, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in an appendix to this brief: 16 U.S.C. 1536, 33 U.S.C. 1342(b), 50 C.F.R. 402.02, 402.03, and 402.14.

STATEMENT

1. This case involves a transfer of administrative authority under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA). The CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. 1251(a)). Under the CWA, the National Pollutant Discharge Elimination System (NPDES) is administered by the Environmental Protection Agency (EPA) unless and until authority to administer the program within a particular State is transferred to state officials. See 33 U.S.C. 1342. The CWA states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to

prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b).

Section 402(b) of the CWA provides that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. 1342(b). The CWA further states that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Ibid.*; see 33 U.S.C. 1342(b)(1)-(9). Those criteria are addressed to whether the responsible state agency has the requisite authority under state law to administer the NPDES program. Section 402(b) thus prescribes "a system for the mandatory approval of a conforming State program." *Shell Oil Co.* v. *Train*, 585 F.2d 408, 410 (9th Cir. 1978) (quoting *Mianus River Preservation Comm.* v. *Administrator, EPA*, 541 F.2d 899, 905 (2d Cir. 1976)); see 33 U.S.C. 1251(b) ("It is the policy of Congress that the States * * * implement the permit program[] under section[] 1342 * * * of this title."). After NPDES permitting authority has been transferred to state officials, EPA can object to a state-issued permit only if it is "outside the guidelines and requirements" of the CWA. 33 U.S.C. 1342(d)(2)(B).

2. Congress enacted the Endangered Species Act of 1973 (ESA) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). Section 2(c)(1) of the ESA, 16 U.S.C. 1531(c)(1), states that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in

furtherance of the purposes of this chapter." Section 4 of the ESA directs the Secretaries of Commerce and the Interior to list threatened and endangered species and to designate their critical habitats. See 16 U.S.C. 1533 (2000 & Supp. IV 2004). The National Marine Fisheries Service (NMFS) administers the Act with respect to species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.101(a), 223.102. The Fish and Wildlife Service (FWS) implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. 17.11, 402.01(b).

Section 7 of the ESA, 16 U.S.C. 1536, is entitled "Interagency cooperation." Section 7(a)(1) states that "[t]he Secretary [of Commerce or the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter," and that "[a]ll other Federal agencies shall, in consultation with and the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1). Section 7(a)(2) states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).

Section 7(b)(3)(A) of the ESA states that, once the consultation process contemplated by Section 7(a)(2) has been completed, "the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a sum-

mary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. 1536(b)(3)(A). Section 7(b)(3)(A) further provides that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of [Section 7] and can be taken by the Federal agency * * * in implementing the agency action." *Ibid.*

Regulations promulgated jointly by the Secretaries of Commerce and the Interior furnish a structure for consultation concerning the likely effects on listed species of proposed federal actions. See 50 C.F.R. Pt. 402. *Inter alia*, the regulations establish a process of "formal consultation," see 50 C.F.R. 402.14, which culminates in the issuance of a biological opinion (BiOp), see 50 C.F.R. 402.14(h), that includes a "detailed discussion of the effects of the action on listed species or critical habitat," 50 C.F.R. 402.14(h)(2). The BiOp assesses the likelihood of jeopardy to listed species and whether the proposed action will result in destruction or adverse modification of designated critical habitat. See 50 C.F.R. 402.14(g).

If FWS or NMFS determines that the action as proposed is likely to jeopardize a listed species, it is required to identify "reasonable and prudent alternatives, if any," that will avoid jeopardy. 50 C.F.R. 402.14(h)(3). In order to qualify as a "reasonable and prudent alternative" as defined in the regulations, an alternative course of action must be capable of implementation in a manner "consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. 402.02. The regulations define the term "effects of the action" to include "indirect effects," *i.e.*, "those that are caused by the proposed action and are later in time, but still are reason-

ably certain to occur." *Ibid.* The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

3. Before 1993, EPA had not engaged in consultation pursuant to Section 7(a)(2) of the ESA when considering state applications for transfer of NPDES permitting authority under Section 402(b) of the CWA. See 06-549 Pet. App. 7a n.3. In that year, however, EPA engaged in consultation before approving South Dakota's transfer application, and it subsequently consulted with respect to applications submitted by Florida, Louisiana, Oklahoma, Texas, and Maine. See *ibid.* In 2001, EPA, FWS, and NMFS entered into a "Memorandum of Agreement [MOA] * * * Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act." 06-340 Pet. App. 245-317. The MOA addressed a number of different areas of interaction among the agencies. The MOA noted that "EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federal listed species," and it stated that the three agencies would "continue to conduct such consultation on a case-by-case basis." *Id.* at 260.

In January 2002, Arizona officials requested EPA's authorization to administer the NPDES program in that State. 06-549 Pet. App. 7a. EPA had previously granted such authorization to 43 other States (and the Virgin Islands). See 65 Fed. Reg. 50,529-50,530 (2000) (listing then-approved States). Consistent with the MOA, EPA subsequently initiated consultation with FWS concerning the likely effects on listed species of the proposed transfer of permitting authority. See 06-340 Pet. App.

559. The EPA regional office prepared and forwarded to FWS a biological evaluation, see *id.* at 587-623, which concluded that Arizona's Water Quality Standards would provide adequate protection to aquatic species, see *id.* at 615-616. EPA also found that its oversight of the State's program would ensure that the State continued to meet CWA requirements, including those for the protection of fish, shellfish, and wildlife. *Id.* at 616.

The FWS regional office staff members who received EPA's biological evaluation agreed with EPA that the proposed transfer of permitting authority would not result in water-quality-related impacts that would adversely affect listed species in Arizona. See 06-340 Pet. App. 564. FWS staff expressed a concern, however, that transfer of the NPDES program to the State could result in certain indirect adverse effects on listed non-aquatic species, such as the cactus ferruginous pygmy-owl and the Pima pineapple cactus. See *id.* at 562.[1] In its own administration of the CWA, EPA would consider the non-water-quality-related impacts of associated development in deciding whether EPA would issue a CWA permit. See *id.* at 563, 566, 576-577. EPA would consult with FWS pursuant to Section 7(a)(2) of the ESA concerning the potential effects of development not only on listed aquatic species but also on listed terrestrial species, and it might deny an application for a discharge permit based on the likely effects on terrestrial species of the associated development. See *id.* at 566, 577. EPA staff believed, however, that if administration of the

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[1] In April 2006, FWS removed the pygmy-owl from the list of endangered and threatened species. See 71 Fed. Reg. 19,452. The Pima pineapple cactus is currently being reviewed to determine whether it is a valid taxonomic entity. See 70 Fed. Reg. 5461-5462 (2005).

NPDES program in Arizona were transferred to state officials, EPA would lack the legal authority under the CWA to object to state permits based on non-water-quality-related impacts on listed species. See *id.* at 564. And because Section 7(a)(2) of the ESA applies only to federal agency action, Arizona officials implementing the NPDES program pursuant to the proposed transfer of authority would not be subject to that provision's no-jeopardy mandate and would not be required to consult with FWS concerning the effects on listed species of individual permitting decisions. See *id.* at 563.

FWS regional staff urged that the consultation process concerning the proposed transfer of NPDES permitting authority to Arizona should include an assessment of the potential impact on terrestrial species that (in FWS staff's view) would result from the inapplicability of Section 7(a)(2) to Arizona's future permitting activities. See 06-340 Pet. App. 565. EPA staff, by contrast, took the position that the transfer of authority could not properly be regarded as the cause of any adverse effects on terrestrial species that might result from subsequent development in Arizona, both because the link between the two is speculative and attenuated as a factual matter, and because the CWA directs EPA to approve a State's application to assume administration of the NPDES program if the criteria in Section 402(b) of the CWA are met. See *id.* at 564-565. Pursuant to procedures set forth in the MOA, that dispute was elevated for resolution at higher levels within the agencies. See *id.* at 562.

On December 3, 2002, FWS issued its BiOp, which concluded that the requested transfer of NPDES permitting authority would not cause jeopardy to listed species. 06-340 Pet. App. 77-124. FWS stated that, "[a]fter

further reflection and analysis of causation and the definition of indirect effects found in our Consultation Handbook, our final opinion is that the loss of section 7-related conservation benefits is not an indirect effect of the approval action." *Id.* at 112. FWS explained, *inter alia*, that the

> loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Id. at 114. FWS also concluded that, even if the effects of the transfer on listed species could properly be attributed to EPA, other mechanisms were sufficient to support the conclusion that the transfer of NPDES permitting authority was not likely to jeopardize a listed species. See *id.* at 101-108.

After FWS issued the BiOp, EPA approved the transfer of permitting authority to Arizona. C.A. App. 232; see 06-340 Pet. App. 69-76. EPA found that Arizona's application satisfied each of the criteria for program approval specified in Section 402(b) of the CWA. C.A. App. 258. In the *Federal Register* notice that announced the approval of Arizona's transfer application, EPA stated that the issuance of the FWS biological opinion had "conclude[d] the consultation process required by ESA section 7(a)(2) and reflects the Service's agreement with EPA that the approval of the State program meets the substantive requirements of the ESA." 06-340 Pet. App. 73.

4. Respondents filed a petition for review in the court of appeals, contending that EPA had acted arbitrarily and capriciously by approving Arizona's request for authority to administer the NPDES program.[2] The court of appeals granted the petition for review. 06-549 Pet. App. 1a-67a.

a. The court of appeals first held that EPA's approval of Arizona's transfer application was arbitrary and capricious because EPA had "relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." 06-549 Pet. App. 23a; see *id.* at 23a-28a. The court explained that, although EPA had construed Section 7 of the ESA as requiring it to consult with FWS concerning the effect on listed species of the proposed transfer of permitting authority, FWS's no-jeopardy opinion was based in part on the premise that EPA cannot deny a transfer application under Section 402(b) of the CWA based on ESA concerns if the CWA criteria are satisfied. See *id.* at 23a-26a. The court concluded that EPA's approval of the transfer application "was not the result of reasoned decisionmaking" because "the two propositions that underlie the EPA's action—that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true." *Id.* at 26a-27a. The court stated that it was therefore required to "remand to the agency for a plausible explanation of

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[2] Petitioners also filed a complaint in district court challenging the FWS BiOp. The district court determined that the court of appeals had exclusive jurisdiction over that challenge pursuant to 33 U.S.C. 1369(b)(1)(D), and it transferred the claim to the court of appeals. 06-549 Pet. App. 13a.

its decision, based on a single, coherent interpretation of the statute." *Id.* at 28a.

b. Rather than, in fact, remanding the case on that ground, however, the court of appeals went on to hold that EPA had both the power and the duty under the ESA to determine whether transfer of NPDES permitting authority to state officials would jeopardize listed species, and to deny a transfer application if it found jeopardy to be likely. 06-549 Pet. App. 28a-48a. The court recognized that it is undisputed in this case that the State of Arizona had satisfied the criteria (see 33 U.S.C. 1342(b)(1)-(9)) that trigger the requirement in Section 402(b) of the CWA that EPA "shall" approve a State's transfer application. See 06-549 Pet. App. 31a n.11. The court concluded, however, that Section 7 of the ESA provides an "affirmative grant of authority to attend to protection of listed species," over and above whatever obligations federal agencies may have under their own governing statutes. *Id.* at 34a; see *id.* at 38a-39a. The court of appeals found that authority to be unaffected by the CWA's directive that EPA "shall approve" state applications that satisfy the criteria set forth in Section 402(b). See 06-549 Pet. App. 40a.[3]

The court of appeals also rejected the contention, advanced by non-federal parties who had intervened in support of EPA, that EPA's approval of the State's

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[3] The Ninth Circuit acknowledged that its resolution of the interpretive question presented here conflicts with decisions of two other courts of appeals. See 06-549 Pet. App. 46a-47a (citing *American Forest & Paper Ass'n* v. *United States EPA*, 137 F.3d 291 (5th Cir. 1998), and *Platte River Whooping Crane Critical Habitat Maint. Trust* v. *FERC*, 962 F.2d 27 (D.C. Cir. 1992)). The court believed, however, that its holding was supported by Ninth Circuit precedent and decisions of two other courts of appeals. 06-549 Pet. App. 42-43a, 44a-46a, 47a-48a.

transfer application was not subject to Section 7 of the ESA because it was not a "discretionary" action within the meaning of 50 C.F.R. 402.03. See 06-549 Pet. App. 40a-43a. The court construed that regulation's reference to "discretionary" action to encompass all agency actions that are "authorized, funded, or carried out" by the agency. *Id.* at 43a (quoting 16 U.S.C. 1536(a)(2)). The court reached that conclusion despite the government's repeated request to have the opportunity for additional briefing on the question if the court, contrary to the suggestion of the government, decided to reach the issue. See *id.* at 43a n.19.[4]

c. Judge Thompson dissented, relying on 50 C.F.R. 402.03 and on an array of Ninth Circuit precedents holding that Section 7(a)(2) of the ESA does not encompass agency conduct as to which the agency lacks discretion. See 06-549 Pet. App. 63a-67a. Judge Thompson explained:

> Here, the EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not "agency action" within the meaning of section 7 of the Endangered Species Act. The Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements, the EPA administrator "shall approve" the program. 33 U.S.C. § 1342(b). This Congressional directive does not permit the EPA to impose additional conditions.

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[4] The court of appeals also held that the other bases for FWS's no-jeopardy conclusion did not adequately support EPA's decision to approve the transfer. See 06-549 Pet. App. 48a-61a.

Id. at 65a-66a (footnote omitted). Judge Thompson concluded that, because "[t]he EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary," the petition for review should be denied. *Id.* at 67a.

d. The court of appeals denied rehearing and rehearing en banc, with six judges dissenting. 06-549 Pet. App. 68a-92a. Judge Kozinski, writing for the dissenting judges, took issue with the majority's determination that EPA's analysis was internally inconsistent. *Id.* at 71a-72a. The dissenting judges further stated that, if EPA's approach had in fact been tainted by such inconsistency, "the majority should have remanded to EPA for further clarification" rather than deciding the merits question itself. *Id.* at 72a. With respect to the proper reconciliation of the relevant statutory provisions, the dissenting judges concluded that, so long as the nine criteria set forth in Section 402(b) of the CWA were satisfied, Section 7 of the ESA neither allowed nor required EPA to deny Arizona's application for transfer of permitting authority. *Id.* at 75a-76a. The dissenting judges observed that, "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Id.* at 78a n.4.

5. In October 2006, after the court of appeals denied rehearing in this case, the relevant federal agencies clarified their positions concerning the applicability of Section 7(a)(2) of the ESA to EPA's NPDES transfer decisions under the CWA. The State of Alaska had submitted an application for transfer of NPDES permitting authority to EPA in July 2006. In connection with that application, EPA requested confirmation from FWS and NMFS of EPA's current view that, because Section

402(b) of the CWA denies EPA discretion to do anything other than approve the State's application if the CWA criteria are satisfied, the decision whether to approve the transfer is not subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. See 06-549 Pet. App. 93a-102a. FWS and NMFS confirmed that they share that understanding of the relevant statutory provisions. See *id.* at 103a-116a. FWS and NMFS further confirmed that, because the CWA requires that transfer applications must be granted under specified circumstances, EPA lacks "discretionary Federal involvement or control," within the meaning of 50 C.F.R. 402.03, over the transfer decision once the CWA criteria are met, and EPA's approval is not the legal "cause[]," within the meaning of 50 C.F.R. 402.02, of any impacts on listed species that may result from a state-issued NPDES permit. See 06-549 Pet. App. 105a-106a, 109a-110a, 114a-115a.

SUMMARY OF ARGUMENT

I. Section 402(b) of the CWA provides without qualification that EPA "shall" approve a State's application for transfer of NPDES permitting authority if the criteria set forth in the CWA are met. Section 7(a)(2) of the ESA does not impliedly repeal that directive, even in situations where the transfer of authority might entail possible jeopardy to listed species. Section 7(a)(2) applies only to conduct that is attributable to the federal agency itself, and any consequences that may follow from an agency's compliance with a mandatory statutory directive are attributable to Congress rather than to the agency. That causation analysis is strongly supported by this Court's recent decision in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004), which

held in a related context that a federal agency cannot be considered the legal cause of effects that it lacks statutory authority to prevent. That reading of Section 7(a)(2) is reinforced by other ESA provisions, which channel federal agencies' exercise of existing discretionary authority but do not confer new powers, and it avoids unnecessary conflicts between the ESA and other Acts of Congress.

The development of Section 7 of the ESA since its enactment in 1973 confirms this reading of Section 7(a)(2) in its current form. Under the 1973 statute, the duty of federal agencies to avoid jeopardizing listed species was explicitly identified as one means by which agencies should "utilize their authorities." That language reflected a clear congressional intent that Section 7 would limit the agencies' exercise of existing authorities but would not grant agencies new power to disregard mandatory statutory obligations. Although the current Section 7(a)(2) does not contain the phrase "utilize their authorities," the legislative history of the relevant ESA amendments and the circumstances under which they were enacted make clear that those amendments were not intended to alter or expand the scope of federal agencies' responsibilities under Section 7.

Longstanding regulations promulgated by FWS and NMFS reflect the expert agencies' view that Section 7(a)(2)'s no-jeopardy mandate does not apply to conduct required by another Act of Congress. Those regulations direct federal agencies to focus on species-related effects "caused" by their own actions, 50 C.F.R. 402.02, and they state that Section 7's requirements apply to agency conduct "in which there is discretionary Federal involvement or control," 50 C.F.R. 402.03. Those regulations reflect a reasonable construction of the statutory

text and are entitled to deference from a reviewing court. Contrary to the view of the court of appeals, this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), does not cast doubt on the agencies' understanding of Section 7(a)(2). The decision in *Hill* makes clear that Section 7(a)(2)'s no-jeopardy mandate supersedes contrary agency policy judgments concerning the appropriate exercise of *discretionary* authority. But because the agency action (operation of a dam) at issue in *Hill* was not mandated by any Act of Congress, the Court had no occasion to address the question presented here.

II. Contrary to the court of appeals' conclusion, EPA's approval of Arizona's transfer application was not rendered arbitrary and capricious either by the agency's initiation of consultation or by its erroneous statements that consultation was legally required. EPA's misstatements did not prejudice respondents because they did not affect the outcome of the proceedings. Nor did those statements obscure the rationale for the agencies' ultimate no-jeopardy determination in a way that would hinder effective judicial review. During the course of the consultation process, EPA and FWS both concluded that EPA's approval of the transfer application should not be regarded as a cause of any harm to listed species that might occur under the state permitting regime because the transfer was mandated by the CWA. The agencies' basic chain of reasoning was therefore clear, even though EPA did not initially perceive the full implications of that causation analysis. In any event, the agencies have since clarified their views on the question presented here.

ARGUMENT

I. APPROVAL OF ARIZONA'S TRANSFER APPLICATION WAS COMPELLED BY SECTION 402(b) OF THE CWA, AND SECTION 7(a)(2) OF THE ESA NEITHER AUTHORIZED NOR REQUIRED EPA TO DISREGARD THAT STATUTORY MANDATE

A. Section 402(b) Of The CWA Unambiguously Required EPA To Approve Arizona's Application For Transfer Of NPDES Permitting Authority

Section 402(b) of the CWA authorizes the Governor of a State to "submit to [EPA] a full and complete description of the [NPDES] program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. 1342(b). A State that seeks to administer the NPDES program must also submit a statement from the appropriate legal officer of the State "that the laws of such State * * * provide adequate authority to carry out the described program." *Ibid.* Section 402(b) provides that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" under state law to perform nine specified categories of functions in connection with the administration of the program. *Ibid.*; see 33 U.S.C. 1342(b)(1)-(9).

The CWA thus unqualifiedly directs EPA to approve a State's application for transfer of NPDES permitting authority "unless" the State fails to satisfy one or more of the requirements set forth in Section 402(b)(1)-(9). Although EPA's determination whether those standards are met in a particular instance may involve the exercise of judgment, EPA does not possess discretion under the CWA to deny a state application, or condition its ap-

proval of such an application, based on considerations other than the enumerated criteria. See 06-549 Pet. App. 82a (Kleinfeld, J., dissenting from denial of rehearing en banc) ("The 'shall/unless' formula makes the nine condition list exclusive."). In the instant case, "[n]o party questioned the EPA's determination that Arizona's transfer application met the Clean Water Act factors." *Id.* at 31a n.11. Under the plain terms of the CWA, EPA was therefore required to approve the State's application.

Respondents contend (Br. in Opp. 25) that the CWA and ESA may be harmonized by holding that EPA must *both* "apply the CWA criteria" *and* "insure" against jeopardy to listed species. In a similar vein, Judge Berzon suggested that, under the interpretive approach adopted by the court of appeals, the ESA does not impliedly repeal any part of the CWA but simply "*adds* one requirement to the list of considerations under the Clean Water Act permitting transfer provision." 06-549 Pet. App. 87a n. 2 (Berzon, J., concurring in the order denying the petition for rehearing en banc). That analysis is misconceived.

Section 402(b) of the CWA does not simply establish *minimum* prerequisites for the transfer of NPDES permitting authority to state officials, leaving EPA with discretion to determine which conforming applications will be approved. Rather, consistent with the overall statutory policy that States should have the "primary responsibilities and rights * * * to prevent, reduce, and eliminate pollution" under the CWA, 33 U.S.C. 1251(b), and that States should implement the NPDES program in particular, see *ibid.*, Section 402(b) *mandates* approval of any state application that meets the specified criteria. If EPA denies a state transfer appli-

cation that satisfies the requirements of Section 402(b)(1)-(9), the agency is not "apply[ing]" the CWA, but rather is acting ultra vires and violating the CWA directive that such applications "shall" be approved. And the ultimate consequence of the court of appeals' "add[ition]" of a tenth criterion to the list contained in Section 402(b)(1)-(9) was that the court vacated an administrative action that the CWA required EPA to take.

B. Section 7(a)(2) Of The ESA Does Not Impliedly Repeal The CWA's Requirement That EPA Must Approve A State Transfer Application That Satisfies The Criteria Set Forth In Section 402(b)(1)-(9)

As we explain above, the court of appeals' disposition of this case is flatly contrary to the unambiguous terms of the CWA. The court's decision cannot reasonably be viewed as harmonizing the two statutory provisions at issue here. Rather, in practical effect, the court treated Section 7(a)(2) of the ESA as impliedly repealing the CWA's directive that EPA "shall approve" a state transfer application unless EPA finds that the application does not satisfy the CWA criteria. See 06-549 Pet. App. 78a-79a n.4 (Kozinski, J., dissenting from denial of rehearing en banc). That holding is erroneous.

1. Repeals by implication are disfavored

"[R]epeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (citations and internal quotation marks omitted). The Court has explained that

> [i]t is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute

> covering a more generalized spectrum, unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all.

Traynor v. *Turnage*, 485 U.S. 535, 547-548 (1988) (citations, brackets, ellipses, and internal quotation marks omitted); see *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will be found only where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.") (internal quotation marks omitted); *Posadas* v. *National City Bank*, 296 U.S. 497, 504 (1936). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

Because Section 402(b) of the CWA deals with the "narrow, precise, and specific subject" (*Traynor*, 485 U.S. at 548) of state transfer applications under the NPDES program, Section 7(a)(2) of the ESA should not be deemed to override the CWA's specification of the circumstances in which such applications can be denied unless the text of Section 7(a)(2) unambiguously compels that result. Indeed, as a general matter, Section 7(a)(2) should be construed in a manner that avoids conflicts with other Acts of Congress if such a construction is fairly possible. In a choice between (1) a statute that effectively allows an agency to consider *only* nine specific factors in acting on a particular application (and in a context where federalism concerns and an interest in respecting the state applicants loom large), and (2) general language injecting jeopardy considerations into a

whole range of agency decisionmaking, the need to enforce the specific, mandatory, and exclusive language is clear. More broadly, the path to harmonization lies in construing Section 7(a)(2) as channelling the exercise of federal agencies' *existing* discretionary authority, not as overriding the mandatory language of other statutes or adding a tenth criterion where Congress clearly specified nine. That reading, which allows Section 7(a)(2) of the ESA to be harmonized with Section 402(b) of the CWA and with other statutory mandates, is consistent with the text and history of Section 7(a)(2) and with the interpretive principles set forth above.[5]

2. Section 7(a)(2)'s no-jeopardy and consultation requirements apply only to discretionary conduct attributable to the relevant federal agency itself, which does not include conduct mandated by another Act of Congress

a. Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Because the word "jeopardize" obviously requires a causal link between the agency's own decisions and jeopardy to

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[5] Even if an agency's performance of a duty imposed by another federal statute could be said to violate Section 7(a)(2), it would not necessarily follow that Section 7(a)(2)'s no-jeopardy mandate supersedes all competing statutory directives. Rather, in any case where the ESA prohibited conduct that another Act of Congress required, the court would need to perform a conflict-of-laws analysis to determine which provision should control. Cf. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 766 (2004). Construing Section 7(a)(2) to apply only to discretionary agency conduct obviates the need for such inquiries.

listed species, Section 7(a)(2) does not require federal agencies to protect listed species from harms caused by other actors. Rather, a federal agency's duty under that provision is simply to ensure that the species is not jeopardized by actions attributable to the agency itself. See *Bennett* v. *Spear*, 520 U.S. 154, 158 (1997) ("If an agency determines that action *it* proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service.") (emphasis added).[6]

Where (as here) the challenged conduct is mandated by an Act of Congress, any alleged jeopardizing effect may not properly be attributed to the federal agency that simply carries out the statutory directive. As FWS explained in its BiOp in this case, any harm to listed species that may result from the challenged transfer is

> not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence [in connection with the issuance of state permits] of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

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[6] Other provisions of the ESA—most notably Section 9's general ban on "takes" of listed species of fish or wildlife, see 16 U.S.C. 1538, and Section 10's provision for the issuance of "'incidental' take" permits on conditions established by FWS or NMFS, see 16 U.S.C. 1539—apply to state officials and private actors as well as to federal agencies. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 690-691, 696-704 (1995). As the FWS BiOp in this case recognized, those provisions will remain applicable to private development activities in Arizona notwithstanding the transfer of NPDES permitting authority to state officials. See 06-340 Pet. App. 112.

06-340 Pet. App. 114. The absence of that process also reflects Congress's decision not to subject the actions of state agencies to the no-jeopardy requirement and ancillary consultation provisions in Section 7(a)(2) of the ESA.

FWS thus correctly recognized that Congress's decision to enact the mandatory directive contained in Section 402(b) of the CWA, rather than EPA's compliance with that command, is the legal cause of any harm to listed species that the transfer of NPDES permitting authority may entail. FWS/NMFS regulations implementing the ESA state that an agency is required to take into account only effects that are "caused" by its actions. See 06-340 Pet. App. 111 (FWS BiOp citing 50 C.F.R. 402.02, which defines "indirect effects" as effects that are both "caused" by the proposed action and "are later in time, but still are reasonably certain to occur").

The gravamen of respondents' challenge to the transfer of NPDES authority is that Arizona's permitting regime will be less protective of listed species than is the NPDES program as administered by EPA officials because the State's individual permitting decisions will not be federal agency actions and therefore will not be subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. That consequence, of course, is a direct result of Congress's deliberate decision to treat state agencies differently from federal agencies. To treat that possibility as a basis for overturning EPA's transfer decision would therefore frustrate Congress's federalism-sensitive judgments to transfer authority to States once the nine CWA criteria are met and not to impose the distinct no-jeopardy and related consultation requirements on state agencies. Those congressional judgments, not any discretionary federal agency action,

would clearly be the cause of any ultimate adverse impact on listed species that might result from activities authorized by state permits following the transfer of NPDES authority to the State.

b. The causation analysis in the FWS BiOp is strongly supported by this Court's subsequent decision in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). The Court in *Public Citizen* held that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, did not require the Federal Motor Carrier Safety Administration (FMCSA) to assess the environmental effects of allowing Mexican trucks onto United States roads once the President lifted a prior moratorium on such vehicles. The Court explained that an agency is "responsible for a particular effect under NEPA" only if "a reasonably close causal relationship [exists] between the environmental effect" and the pertinent agency conduct. 541 U.S. at 767 (internal quotation marks omitted). The Court further observed that

> FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable * * * requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

Id. at 758-759 (citation and internal quotation marks omitted). In those circumstances, the Court reasoned, "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while

simultaneously limiting FMCSA's discretion." *Id.* at 769.

The Court in *Public Citizen* concluded that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. The same principle applies here. Because the CWA forecloses EPA's ability to deny a State's transfer application based on projections of injury to listed species, EPA is not the legal cause of any such harm that may result from activities that are authorized by NPDES permits issued by the State of Arizona after the transfer occurs. Instead, insofar as the federal government is concerned, the legally relevant cause would be the action of "Congress in * * * limiting [EPA's] discretion," *id.* at 769, by mandating approval of a transfer application that satisfies the criteria in Section 402(b) of the CWA. The agency's approval of Arizona's transfer application therefore cannot properly be said to "jeopardize"—*i.e.*, *cause* jeopardy to—the continued existence of any listed species.[7]

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[7] Alternatively, EPA's lack of discretion in this area would support a conclusion that EPA's approval of a State's transfer application in accordance with the CWA's command is not an "agency action" within the meaning of Section 7(a)(2) of the ESA. See 06-549 Pet. App. 65a (Thompson, J., dissenting). Although an action taken by an agency in compliance with a statutory mandate could be viewed as an "action * * * carried out by" the agency for purposes of Section 7(a)(2), that language can also be read to cover only actions properly *attributed* to the agency—*i.e.*, those in which the agency provides the critical causal link by choosing to authorize, fund, or carry out an action that would not otherwise occur. The latter reading avoids the absurd consequence of requiring the agency to consider the marginal effect of actions over which the agency has no control whatever, but instead is directed by Congress to perform.

Thus, Section 7(a)(2) does not "expressly contradict" the specific mandate of CWA Section 402(b). See *Traynor*, 485 U.S. at 548. Nor is respondents' proposed construction of Section 7(a)(2) "absolutely necessary in order that the words of [Section 7(a)(2)] shall have any meaning at all," *ibid.* (brackets, ellipses, and citation omitted), since Section 7(a)(2) has significant practical effect even though its coverage is limited to discretionary agency conduct. Accordingly, the court of appeals erred in construing Section 7(a)(2) to override the mandatory approval provision of Section 402(b) of the CWA. Properly understood, Section 7(a)(2) "serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction." *American Forest & Paper Ass'n* v. *United States EPA*, 137 F.3d 291, 299 (5th Cir. 1998); see *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005) (explaining that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority"), cert. denied, 126 S. Ct. 1879 and 1880 (2006); *Platte River Whooping Crane Critical Habitat Maint. Trust* v. *FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); note 3, *supra*.[8]

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[8] In support of its conclusion that the ESA vests federal agencies with additional authority to protect listed species, even in the face of a statute that imposes a mandatory duty and limits consideration to an enumerated list of discrete factors, the court of appeals attached significance to Section 7(a)(2)'s use of the word "insure," which the court understood to mean "make certain." 06-549 Pet. App. 31a-32a. The court stated:

c. Other ESA provisions reinforce the conclusion that Section 7(a)(2)'s no-jeopardy and ancillary consultation requirements apply only to an agency's exercise of existing authorities and do not apply to agency conduct that is mandated by another federal statute. Section 2(c)(1) reflects Congress's policy judgment that all federal agencies "shall *utilize their authorities* in furtherance of" the statute's purposes. 16 U.S.C. 1531(c)(1) (emphasis added). Section 7(a)(1) similarly provides that agencies "*shall * * * utilize their authorities* in furtherance of the purposes of [the ESA] by carrying

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> Unless an agency has the authority to take measures to prevent harm to endangered species, it is impossible for that agency to "make certain" that its actions are not likely to jeopardize those species. Otherwise, agencies would be forced to choose between violating section 7's prohibition on agency actions that are likely to jeopardize listed species and acting beyond their powers to protect such species.

Id. at 32a. That analysis is misconceived. The impossibility that drove the court of appeals to derive new authority for the agency was itself a product of applying Section 7(a)(2) in a circumstance where it is inapplicable—*i.e.*, a circumstance in which the agency's existing authority gives it no discretion to consider the effect of an action mandated by Congress. Congress's use of the word "insure" suggests not that Section 7(a)(2) vests federal agencies with new and ill-defined authority, but that the statute applies only in situations where agencies have the practical capacity to prevent jeopardy to listed species. Section 7(a)(2) does not require federal agencies to "insure" that listed species are not jeopardized by the conduct of actors other than the agency itself. Rather, by its terms, Section 7(a)(2) directs agencies to "insure" only that their *own* actions are not likely to be the cause of jeopardy. That statutory mandate is properly applied in accordance with the background principles of legal causation discussed in the text. That more modest role for Section 7(a)(2) was even more evident in its original version, but the basic scope of the no-jeopardy requirement has never been altered. See pp. 29-34, *infra*.

out programs for the conservation of endangered species." 16 U.S.C. 1536(a)(1) (emphasis added). And Section 7(b)(3)(A), which governs the inter-agency consultation process, states that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [Section 7(a)(2)] and *can be taken by the Federal agency* * * * in implementing the agency action." 16 U.S.C. 1536(b)(3)(A) (emphasis added).[9] The italicized language in each of those provisions reflects Congress's intent that federal agencies' efforts to prevent harm to listed species must be undertaken in conformity with any constraints imposed by other laws.

d. Pursuant to ESA amendments enacted in 1978 (see pp. 31-33, *infra*), Congress has established an Endangered Species Committee and has authorized that body to grant exemptions authorizing agency conduct that would otherwise violate Section 7(a)(2). See 16 U.S.C. 1536(e)-(*l*). Respondents contend (Br. in Opp. 27 & n.13) that Congress's creation of the exemption procedure supports their argument that the requirements of Section 7 apply even where an agency is acting pursuant to an express statutory directive. The statutory language makes clear, however, that the exemption mechanism was not intended to address such situations. The ESA requires an applicant for an exemption to show, *inter alia*, that it has exhausted the consultation process and has "made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action

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[9] Accord 50 C.F.R. 402.02 (defining reasonable and prudent alternatives as alternatives that, *inter alia*, "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction").

which would not violate subsection (a)(2) of this section." 16 U.S.C. 1536(g)(3)(A)(i). That requirement could not sensibly be applied to circumstances in which an agency is required by statute to take a particular described action. Indeed, the court of appeals itself noted that the exemption provisions "focus on practical concerns, not legal constraints on agency power to protect species." 06-549 Pet. App. 37a.

3. The development of Section 7 of the ESA since its original enactment in 1973 confirms that the no-jeopardy requirement of current Section 7(a)(2) does not override mandates or constraints imposed by other Acts of Congress

The court of appeals appeared to recognize that the phrase "utilize their authorities," where it appears in the ESA, reflects Congress's intent that federal agencies pursue the ESA's objectives only to the extent that they are permitted to do so by other provisions of law. See 06-549 Pet. App. 34a-35a, 46a. The court concluded, however, that because Section 7(a)(2) itself does not contain that phrase or similar limiting language, Section 7(a)(2)'s no-jeopardy mandate supersedes mandatory directives contained in other Acts of Congress. See *ibid.* That conclusion reflects a misunderstanding of the ESA's history.

a. As originally enacted in 1973, Section 7 of the ESA directed all federal agencies to

> utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for the conservation of endangered species and threatened species * * * and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued exis-

> tence of such endangered species and threatened species or result in the destruction or modification of [critical] habitat of such species.

ESA, Pub. L. No. 93-205, 87 Stat. 892 (16 U.S.C. 1536 (1976)). As that text makes clear, in Section 7's original form, the obligations of federal agencies to carry out conservation programs (now contained in Section 7(a)(1)) and to avoid jeopardy (now contained in Section 7(a)(2)) were *both* qualified by the phrase "utilize their authorities." Consistent with that limitation, Representative Dingell, the floor manager of the bill in the House of Representatives, explained that the ESA as originally enacted "substantially amplified the obligation of * * * agencies * * * to take steps *within their power* to carry out the purposes of this act." 119 Cong. Rec. 42,913 (1973) (emphasis added). This Court quoted that very statement by Representative Dingell in its seminal ESA decision in *TVA* v. *Hill*, 437 U.S. 153, 183 (1978).[10]

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[10] The relevant House Report contained the following description of Section 7(a) of the House bill (H.R. 37, 93d Cong., 1st Sess. (1973) (as reported by the House Comm. on Merchant Marine and Fisheries)), which was substantively equivalent to Section 7 of the ESA as enacted in 1973:

> This subsection requires the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species, and it further requires that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 14 (1973). In the court of appeals' view, the report's description of the no-jeopardy mandate as a "further require[ment]," beyond the directive to engage in conservation measures, reinforces the inference that the omission of the phrase "utilize their authorities" from current Section 7(a)(2) should be treated

b. Through amendments enacted in 1978, Section 7 of the ESA was divided into subsections. See Endangered Species Act Amendments of 1978 (1978 Amendments), Pub. L. No. 95-632, § 3, 92 Stat. 3752 (16 U.S.C. 1536 (Supp. II 1978)). Subsection (a) of Section 7, as enacted in those 1978 amendments, contained in one paragraph substantially the same language as is now set forth in current Subsections 7(a)(1) and (2). As amended in 1978, Section 7(a) provided as follows:

> Consultation.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of [the ESA]. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless such agency has been granted

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as significant. See 06-549 Pet. App. 34a-35a. But because the text of Section 7 of the 1973 ESA itself described the avoidance of jeopardy as one end to which federal agencies should "utilize their authorities," the court's interpretation of the 1973 legislative history is clearly unfounded.

an exemption for such action by the Committee pursuant to subsection (h) of this section.

1978 Amendments § 3, 92 Stat. 3752 (16 U.S.C. 1536(a) (Supp. II 1978)).

The Conference Report accompanying the 1978 Amendments explained that the new subsection 7(a) "essentially restates section 7 of existing law." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Thus, while the no-jeopardy and ancillary consultation requirements were set forth in a separate sentence that did not repeat the phrase "utilize their authorities" contained in the preceding sentence, the 1978 legislative history indicates that Congress in rewording Section 7 did not seek to expand the scope of federal agencies' no-jeopardy and consultation duties in potentially far-reaching ways, but rather intended to preserve the substance of the requirements in their prior form. Indeed, the court of appeals in this case recognized that "[t]he 1978 amendment did not change section 7's substantive provisions," 06-549 Pet. App. 36a, though the court failed to appreciate the significance of that fact. The clear import of the 1978 Amendments therefore is that the obligation of an agency not to jeopardize a listed species remained simply a particular (albeit mandatory) aspect of the more generalized provision in the preceding sentence for agencies to "utilize their authorities" in furtherance of the Act's purposes.

The foregoing history is particularly significant in light of the events that precipitated passage of the 1978 Amendments. Those amendments were enacted only a few months after this Court's decision in *TVA* v. *Hill*, *supra*, which construed the ESA to preclude operation of the Tellico Dam in Tennessee. See 437 U.S. at 156-158, 193-195. *Inter alia*, the 1978 Amendments softened

the practical effect of the decision in *Hill* by creating the Endangered Species Committee, which is authorized to grant exemptions from Section 7(a)(2)'s no-jeopardy mandate, see 1978 Amendments, § 3, 92 Stat. 3753-3760 (16 U.S.C. 1536(e)-(q) (Supp. II 1978)), and by directing the Committee promptly to determine whether the Tellico Dam and Reservoir Project should be granted an exemption, see § 5, 92 Stat. 3761. Given that sequence of events and the resulting thrust of the 1978 Amendments, it is most unlikely that Congress chose simultaneously to *expand* the reach of Section 7's no-jeopardy requirement to require an agency to ignore a mandate in another Act of Congress. And it is altogether implausible to suppose that Congress intended to accomplish that result obliquely, by putting the phrase "utilize their authorities" in a separate sentence from Section 7(a)'s no-jeopardy and consultation requirements, without mentioning the change in the legislative history. Cf. *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132-134 (2003) (declining to construe 1986 amendments to the False Claims Act as impliedly removing municipal corporations from the Act's coverage when such a change would have been contrary to the primary thrust of the 1986 legislation).

Finally, in 1979, Section 7(a) was further divided into subsections (1), (2), and (3), see Act of Dec. 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226, and Section 7(a) remains in that form.[11] Once again, however, that further subdivision made no substantive change. Accordingly, an agency's duty to "insure" that its actions will not jeopardize a listed species (and to engage in consul-

[11] The 1979 amendments also added the final sentence of what is now Section 7(a)(2).

tation to that end) continues to be limited to measures the agency might take to "utilize [its] authorities" under existing law.

4. Regulations promulgated by FWS and NMFS in 1986 reflect the expert agencies' view that Section 7(a)(2)'s no-jeopardy mandate does not apply to conduct required by another Act of Congress

a. The federal agencies charged with primary responsibility for the administration of the ESA have addressed the application of Section 7(a)(2)'s no-jeopardy and consultation requirements to agency conduct, like EPA's approval of Arizona's transfer application in this case, that is affirmatively mandated by some other provision of law. First, as noted above, a regulatory provision jointly adopted by FWS and NMFS states that the relevant effects on listed species under Section 7(a)(2) are those "caused" by the agency's own action. 50 C.F.R. 402.02 (defining "[e]ffects of the action"). The effects of a statutory mandate are caused by Congress, not by the agency. See pp. 22-25, *supra*.

Second, another regulatory provision adopted jointly by FWS and NMFS states that "Section 7 and the requirements of [50 C.F.R. Pt. 402, concerning the no-jeopardy provision and consultation process] apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. 402.03 (emphasis added). That rule reflects the longstanding view of FWS and NMFS that Section 7 channels federal agencies' exercise of existing authority and discretion, but does not supersede other legal constraints on agency conduct. See 06-549 Pet. App. 64a (Thompson, J., dissenting) (discussing prior Ninth Circuit decisions that had relied on 50 C.F.R. 402.03 in holding Section 7(a)(2) inapplicable to

situations where an agency lacks discretionary authority to act to benefit listed species).[12] The construction of Section 7 of the ESA that is reflected in 50 C.F.R. 402.02 and 402.03 is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 703 (1995) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation.").

The FWS/NMFS regulations reflect a reasonable construction of Section 7(a)(2). By its terms, Section 7(a)(2) requires federal agencies to ensure, not that a listed species is never placed in jeopardy, but that a likelihood of jeopardy is not caused by actions attributable to the agency itself FWS and NMFS have reasonably interpreted Section 7(a)(2)'s no-jeopardy and consulta-

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[12] See, *e.g.*, *Ground Zero Ctr. for Non-Violent Action* v. *United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding that Section 7(a)(2) of the ESA did not apply to the upgrading of Trident II missile facilities "because the Navy lacks the discretion to cease Trident II operations * * * for the protection of the threatened species"); *Environmental Prot. Info. Ctr.* v. *Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir. 2001) (holding that FWS had not retained sufficient discretionary control over an earlier-issued permit to require the permittee to take steps that would benefit newly-listed species, and hence was not required to reinitiate consultation under Section 7(a)(2) when new species were listed in the area subject to the permit); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (holding that Section 7(a)(2) did not apply to the Bureau of Land Management's approval of road construction under a right-of-way agreement where the agreement had not retained discretionary authority for the agency to demand protections for listed species).

tion requirements to apply only to *discretionary* agency actions because a federal agency cannot properly be held responsible for conduct that it is legally obliged to undertake. The construction of Section 7(a)(2) set forth in the regulations is thus consistent with the statutory text and with background principles of legal causation. Under respondents' view, by contrast, Section 7(a)(2) would require every federal agency to ensure that its performance of mandatory duties over which it has no discretion does not jeopardize listed species, and it would potentially authorize agencies to override specific statutory directives when a no-jeopardy finding cannot be made. Adopting an interpretation that avoids such consequences is surely reasonable.

b. The court of appeals did not hold the pertinent FWS/NMFS regulations invalid, but instead purported to reconcile those regulations with its conclusion that Section 7(a)(2) overrides the mandatory provisions of other federal statutes. The court's analysis is unpersuasive. The court quoted 50 C.F.R. 402.02 and recognized its parallel to the causation standard under NEPA as explained in *Public Citizen*. See 06-549 Pet. App. 30a. The court nevertheless attributed to EPA the effects of an administrative decision mandated by Congress, thus reaching a conclusion flatly contrary to *Public Citizen*'s holding and analysis.

As for 50 C.F.R. 402.03, the court of appeals construed its reference to "actions in which there is discretionary Federal involvement or control" to encompass EPA's approval of Arizona's transfer application, on the ground that "EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application." See 06-549 Pet. App. 44a. Under the CWA, however, EPA did *not* have discretion to grant or deny the

transfer, but was instead compelled to grant Arizona's application once the CWA criteria were satisfied. The court's construction of 50 C.F.R. 402.03 as encompassing agency conduct mandated by Congress effectively reads the word "discretionary" out of the regulation. Indeed, the court of appeals acknowledged that, under prior Ninth Circuit decisions construing 50 C.F.R. 402.03, Section 7(a)(2) of the ESA does not apply "where the challenged action [i]s legally foreordained by an earlier [agency] decision, such as where the agency lack[s] the ability to amend an already-issued permit." 06-549 Pet. App. 41a. The court of appeals did not explain, however, why conduct mandated by an Act of Congress should be treated as "discretionary" if conduct "foreordained" by an agency's own prior administrative decisions is not.

In any event, whatever uncertainty might previously have existed concerning the proper interpretation of 50 C.F.R. 402.02 and 402.03 has since been eliminated. In connection with the State of Alaska's application for transfer of NPDES permitting authority, FWS and NMFS have confirmed that, because the CWA requires that transfer applications must be granted under specified circumstances, EPA's approval is not the legal "cause," within the meaning of 50 C.F.R. 402.02, of any impacts on listed species that may result from a state-issued NPDES permit. See 06-549 Pet. App. 105a-106a, 115a-116a. FWS and NMFS have further confirmed that, in light of the mandatory character of Section 402(b) of the CWA, EPA lacks "discretionary Federal involvement or control," within the meaning of 50 C.F.R. 402.03, over the transfer decision once the CWA criteria are met. See 06-549 Pet. App. 109a-110a, 114a-115a. Under this Court's decisions, the interpretation of 50 C.F.R. 402.02 and 402.03 set forth in the recent ex-

change of letters is "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). As in *Auer*, "[t]hat deferential standard is easily met here." *Ibid.*[13]

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[13] The government's brief in the court of appeals stated:

> The holding in [*American Forest & Paper Ass'n*, *supra* (see note 3, *supra*)] supports a finding that EPA lacks "discretionary involvement or control" in the approval of a state NPDES program and thus, the decision to approve a program is not subject to the requirements of § 7. *See* 50 C.F.R. § 402.03. As that was not a basis for EPA's decision in this case or FWS' [BiOp], [EPA does] not make that argument in this case, and this Court need not address this issue.

Gov't C.A. Br. 31 n.9. The private intervenors (petitioners in No. 06-340), however, relied on 50 C.F.R. 402.03 in arguing that, because EPA lacked "discretionary involvement or control" over the decision whether to approve Arizona's transfer application, Section 7(a)(2) was inapplicable to that decision. The court of appeals did not treat the government's silence on this point as a ground for ignoring the regulation, but instead announced its own construction of the rule, see 06-549 Pet. App. 39a-44a, which is flatly inconsistent with that of the federal agencies that administer it and are responsible for its promulgation. The court of appeals also noted the potential relevance of 50 C.F.R. 402.02, though the court construed that regulation in a manner inconsistent with this Court's causation analysis in *Public Citizen*. See 06-549 Pet. App. 29a-30a; p. 36, *supra*. This Court therefore should consider and give deference to those regulatory provisions in resolving the question of statutory construction presented in this case. The Court should also defer to the interpretation of those regulations that is set forth in the recent inter-agency correspondence, even though those letters postdated the court of appeals' decision in this case. Cf. *Auer*, 519 U.S. at 461-462 (deferring to the Secretary of Labor's interpretation of the Secretary's regulations when that interpretation was first announced in a brief in that case filed at the invitation of this Court).

5. This Court's decision in TVA *v.* Hill *does not support the court of appeals' analysis*

The court of appeals viewed this Court's decision in *TVA* v. *Hill*, *supra*, as supporting the conclusion that Section 7(a)(2) of the ESA supersedes mandatory directives contained in other federal statutes. The court's reliance on *Hill* was misplaced.

a. The Court in *Hill* held that Section 7 of the ESA prohibited the Tennessee Valley Authority (TVA) from putting the Tellico Dam into operation when that action would "either eradicate the known population of [endangered] snail darters or destroy their critical habitat." 437 U.S. at 171; see *id.* at 156-158, 193-195; pp. 32-33, *supra*. The Court rejected the contention that continuing lump-sum congressional appropriations for the TVA had impliedly repealed Section 7's no-jeopardy mandate as it applied to the dam. 437 U.S. at 189-193. Although the House and Senate Appropriations Committees had issued reports that purported to "direct[]" the TVA to complete the Tellico Project, see *id.* at 164, 167, the Court noted that "[t]he Appropriations Acts did not themselves identify the projects for which the sums had been appropriated," *id.* at 189 n.35, and it explained that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress," *id.* at 191. Accord *Lincoln* v. *Vigil*, 508 U.S. 182, 192-194 (1993) (holding that expenditures from lump-sum appropriations are discretionary in nature).

Because the relevant Appropriations Acts *authorized* but did not *require* the TVA to put the Tellico Dam into operation, this Court had no occasion to consider the application of the ESA's no-jeopardy mandate to conduct required by another Act of Congress. The Court in

Hill did not suggest that Section 7 of the ESA superseded an express statutory directive like that contained in Section 402(b) of the CWA. Indeed, any such holding would have been implausible under the version of Section 7 that was in effect when *Hill* was decided, which identified the avoidance of jeopardy to listed species as simply one means by which federal agencies were directed to "utilize their authorities in furtherance of the purposes of" the ESA. See pp. 29-30, *supra*; *Hill*, 437 U.S. at 160. Furthermore, as noted above (see p. 30, *supra*), the Court in *Hill* quoted the statement by Representative Dingell, the floor manager of the bill, explaining that the ESA substantially amplified the duty of federal agencies to take steps "within their power" to carry out the Act's purposes. See 437 U.S. at 183 (quoting 119 Cong. Rec. at 42,913).

b. The Court in *Hill* also noted that previous endangered species legislation had "qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only '*insofar as is practicable and consistent with the[ir] primary purposes.*'" 437 U.S. at 181 (quoting Endangered Species Conservation Act of 1969, Pub. L. No. 89-669, § 1(b), 80 Stat. 926, repealed by ESA, Pub. L. No. 93-205, § 14, 87 Stat. 903). The Court further observed that a bill passed by the Senate in 1973 had "merely required federal agencies to 'carry out such programs *as are practicable* for the protection of species.'" *Id.* at 182 (quoting S. 1983, 93d Cong., 1st Sess. § 7(a) (1973)). The court of appeals viewed Congress's deletion of prior statutory references to practicability and consistency with primary agency purposes as reinforcing the court of appeals' interpretation of the 1973 ESA as ultimately enacted. See 06-549 Pet. App. 34a. That inference is unfounded, since

species-protective measures that are otherwise prohibited by an Act of Congress are different in kind from measures that an agency simply regards as impracticable or inconsistent with its primary mission. Congress's determination that the ESA's no-jeopardy mandate should supersede an agency's discretionary policy choices does not imply—much less clearly manifest (see pp. 19-20, *supra*)—an intent to repeal enacted laws.

II. EPA'S APPROVAL OF ARIZONA'S TRANSFER APPLICATION WAS NOT ARBITRARY OR CAPRICIOUS, AND A REMAND TO THE AGENCY IS UNNECESSARY, PARTICULARLY BECAUSE EPA, FWS, AND NMFS HAVE CLARIFIED THEIR UNDERSTANDING OF THE LEGAL ISSUES PRESENTED HERE

Before addressing the question whether Section 7(a)(2) of the ESA applies to agency conduct that is mandated by another Act of Congress, the court of appeals reviewed the course of agency proceedings in this case and concluded that "EPA's approval of Arizona's transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." 06-549 Pet. App. 23a. The court found that a principal basis for FWS's finding that the transfer of permitting authority would not jeopardize listed species—*i.e.*, FWS's conclusion that the transfer decision was not the legal cause of any harm to the species because the transfer was mandated by Section 402(b) of the CWA—was inconsistent with EPA's antecedent determination that consultation was required by Section 7(a)(2) of the ESA. See *id.* at 25a-26a. The court stated that, "[b]y relying on [the FWS BiOp's] line of reasoning after determining that it did

have a consultation obligation, the EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult." *Id.* at 25a. The court explained that such a position would be contrary to the text of Section 7(a)(2), which "makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species." *Id.* at 26a.

The court of appeals was correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand,[14] and that Section 7(a)(2) does not require federal agencies to consult about conduct to which the no-jeopardy mandate does not apply. The court was also correct that the course of agency proceedings in this case reflected a degree of confusion regarding the ESA's application to the NPDES transfer decision. EPA's prior statements that it was legally required to consult, however, do not cast doubt on the lawfulness of its ultimate decision to grant Arizona's transfer application, and the relevant federal agencies have since clarified their understanding of the legal principles that govern in this setting.

A. EPA's Initiation Of Consultation In This Case Does Not Preclude The Agencies' Ultimate Determination That Approval Of The State's Transfer Application Would Not Jeopardize Listed Species

Section 7(a)(2) of the ESA states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any [agency ac-

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[14] But cf. *American Forest & Paper Ass'n*, 137 F.3d at 298 n.6 (suggesting possible distinction between consulting obligations and substantive powers).

tion] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That phrasing makes clear that "consultation" with FWS or NMFS is not an end in itself, but rather is a means of ensuring compliance with Section 7(a)(2)'s substantive no-jeopardy mandate. Once it is confirmed that an agency is *compelled* by another federal law to engage in particular conduct, Section 7(a)(2) of the ESA does not require the agency to engage in consultation concerning species-related impacts that it has no authority to prevent. Cf. *Public Citizen*, 541 U.S. at 767-769 (holding that, under the "rule of reason" implicit in NEPA, a federal agency is not required to assess the environmental impacts of an action that it is legally obligated to perform).

The FWS BiOp did not discuss 50 C.F.R. 402.03, and it did not address the question whether the consultation that produced the BiOp was required by the ESA. The BiOp's no-jeopardy finding, however, was grounded in substantial part on FWS's conclusion that, even if Arizona's administration of the NPDES program proved to be less protective of listed species than the prior EPA regime, that disparity would not be "caused" by EPA's approval of the transfer, but instead would be attributable to "Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." 06-340 Pet. App. 114. Because Section 7(a)(2)'s consultation requirement is intended to facilitate compliance with the no-jeopardy mandate—and therefore applies only to conduct that is properly attributable to the agency—FWS's causation analysis logically implies that consultation on Arizona's transfer application was not compelled by the ESA.

Neither the ESA nor the CWA, however, *prohibits* a federal agency from seeking the views of FWS or NMFS concerning the effects on listed species of conduct that the CWA requires, even though consultation in those circumstances would not be statutorily-required and would not serve its usual purpose of facilitating compliance with Section 7(a)(2)'s no-jeopardy requirement. In some cases, moreover, it may require significant factual or legal analysis to determine whether a potential effect on listed species is properly attributable to an action mandated by Congress or to a related discretionary judgment, and consultation with FWS or NMFS would be an appropriate means of resolving that question. Cf. 06-549 Pet. App. 73a (Kozinski, J., dissenting from denial of rehearing en banc). EPA's decision to initiate consultation with FWS concerning Arizona's transfer application therefore was not inconsistent with FWS's ultimate determination that any harm to listed species that the transfer might entail was legally attributable to Congress rather than to EPA.

B. Although EPA Incorrectly Stated During The Administrative Process That Consultation Was Required By The ESA, Those Misstatements Do Not Render The Challenged Agency Action Arbitrary Or Capricious

At both the beginning and the end of its consideration of Arizona's transfer application, EPA expressed the view that consultation concerning that application was required by the ESA. Thus, in soliciting comments on the transfer application, EPA cited Section 7(a)(2) of the ESA and stated that "[t]he approval of the State permitting program under section 402 of the Clean Water Act is a federal action subject to this requirement." 06-340 Pet. App. 559. And the *Federal Register* notice

that announced EPA's approval of the State's application stated that "[i]ssuance of the biological opinion * * * concludes the consultation process required by ESA section 7(a)(2)." *Id.* at 73.[15] EPA's characterization of the consultation as a process "required" by Section 7(a)(2) is not consistent with the relevant federal agencies' understanding of Section 7(a)(2) as reflected in the FWS/NMFS regulations, see 50 C.F.R. 402.02, 402.03; pp. 34-38, *supra*, and in more recent agency pronouncements, see 06-549 Pet. App. 93a-116a; pp. 13-14, *supra*; pp. 48-49, *infra*.

Not every misstatement of law, however, renders an associated agency decision arbitrary or capricious. The Administrative Procedure Act (APA) provides that, when a reviewing court determines whether challenged agency action is arbitrary or capricious, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706.[16] Thus, "[i]n administrative law, as in federal civil and criminal litigation, there is a harmless error rule." *PDK Labs., Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (citing 5 U.S.C. 706). "If the

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[15] EPA had made similar statements in considering some prior state applications for transfer of NPDES permitting authority. See 64 Fed. Reg. 73,552, 73,554-73,555 (1999) (requesting comment on Maine application); 66 Fed. Reg. 12,791, 12,793-12,794 (2001) (approving the same); 63 Fed. Reg. 33,657-33,658 (1998) (seeking comment and approving public hearing on Texas application); 61 Fed. Reg. 65,047, 65,053 (1996) (approving Oklahoma application); *id.* at 47,931, 47,934-47,935 (requesting comment on Louisiana application). See also 06-549 Pet. App. 7a-8a n.3.

[16] Although the instant case involves a petition for direct court of appeals review of EPA's transfer decision pursuant to 33 U.S.C. 1369(b)(1), see 06-549 Pet. App. 14a-16a, the parties agree that the case is governed by the standards of review set forth in 5 U.S.C. 706, see 06-549 Pet. App. 20a-21a & n.9.

agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *Ibid.*; see *DSE, Inc.* v. *United States*, 169 F.3d 21, 31 (D.C. Cir. 1999) ("Under the APA, we will not set aside agency action unless the party asserting error can demonstrate prejudice from the error.") (brackets and internal quotation marks omitted).

In the instant case, EPA's misperception that it was legally required to consult on Arizona's transfer application did not affect the outcome of the agency proceedings. If EPA had recognized from the outset that Section 7(a)(2)'s consultation requirement did not apply, the agency would still have granted Arizona's application once it determined that the CWA criteria were satisfied. Respondents therefore were not prejudiced by EPA's erroneous view that the consultation was required by Section 7(a)(2).

Nor did EPA's misstatements preclude informed judicial review by obscuring the basic rationale for the agency's transfer decision. The analysis contained in FWS's BiOp reflects a correct understanding of the causation principles that govern in this area, and it provides a fully sufficient basis for concluding that approval of Arizona's transfer application would not jeopardize any listed species. See pp. 22-25, *supra*. During the consultation process, moreover, the pertinent EPA regional office expressed the view that its approval of the State's application was "not the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits" because, *inter alia*, "section 402(b) of the CWA states that EPA 'shall' approve the State program if it meets certain specified criteria." 06-340 Pet. App. 564, 565.

Although a reviewing court "may not supply a reasoned basis for the agency's decision that the agency itself has not given," the court "will * * * 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Here, both EPA and FWS ultimately recognized that, in light of the directive set forth in Section 402(b) of the CWA, EPA was not properly treated as the legal cause of any effects on listed species that the transfer of NPDES permitting authority might entail. The only issue directly before the court of appeals was the propriety of the agencies' no-jeopardy determination, and the court did not assert that the agencies' rationale for *that* determination was unclear.

Because the relevant agencies in the MOA had previously expressed their intent to continue to consult on NPDES transfer decisions, the question whether consultation about Arizona's application was legally required was of little practical importance, and the documents prepared in connection with that application contain only passing references to that issue. Thus, despite EPA's failure at that time to appreciate the full logical implications of the causation analysis suggested by the EPA regional office and incorporated into the FWS BiOp, the administrative record clearly reveals the agencies' bases for concluding that the transfer of permitting authority would not jeopardize listed species. Because EPA's isolated references to the consultation as a process "required" by the ESA neither prejudiced respondents nor obscured the rationale for the no-jeopardy

finding, the court of appeals was not required to remand the matter to the agency for further clarification.[17]

C. A Remand For Further Administrative Proceedings Is Unnecessary At The Present Stage Of The Case Because EPA, FWS, And NMFS Have Clarified Their Current Views Concerning The Applicability Of Section 7(a)(2)'s Consultation And No-Jeopardy Requirements To Transfers Of NPDES Permitting Authority

In any event, a remand to the agency for further clarification is unnecessary at the current stage of the case. In connection with Alaska's application for transfer of NPDES permitting authority (see pp. 13-14, *supra*), EPA requested confirmation from FWS and NMFS of EPA's current view that "the no-jeopardy *and consultation* duties of ESA Section 7(a)(2) do not apply

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[17] If the administrative record had failed to identify a clear and coherent rationale for EPA's approval of the State's transfer application, or had failed to address a material legal or factual issue, the court of appeals would have been required under established principles to remand the matter to the agency rather than attempting to resolve the disputed interpretive question in the first instance. See 06-549 Pet. App. 72a (Kozinski, J., dissenting from denial of rehearing en banc); see also *Gonzales* v. *Thomas*, 126 S. Ct. 1613, 1614-1615 (2006) (per curiam) (summarily reversing court of appeals decision and directing the court to remand the case to the agency for initial resolution of a contested immigration-law issue); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *Burlington N., Inc.* v. *United States*, 459 U.S. 131, 143 (1982) (holding that, if a reviewing court is unsure about the continued vitality of a prior agency position, the more appropriate course is to remand to the agency for explanation); *General Chem. Corp.* v. *United States*, 817 F.2d 844, 850 (D.C. Cir. 1987) (holding that, when an agency has failed to engage in reasoned decisionmaking, a reviewing court should not itself determine what the result should have been).

to approval of a State's application to administer the NPDES program." 06-549 Pet. App. 96a (emphasis added); see *id.* at 93a-102a. EPA noted the court of appeals' statement in this case that the agency had taken "'contradictory' positions regarding the application of ESA Section 7(a)(2) to Arizona's application to administer the NPDES program," and it expressed the hope that "obtaining [FWS's and NMFS's] views on these issues in advance of processing Alaska's application may avoid a repetition of that problem here." *Id.* at 95a.

In response to EPA's letter, FWS and NMFS confirmed their understanding that consultation is not required in this context. See 06-549 Pet. App. 107a (FWS states that "there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies"); *id.* at 116a (NMFS "concur[s] with EPA's conclusion that EPA is not required to engage in section 7 consultation on applications to approve State programs in situations under Section 402(b) of the CWA"). The agencies have thus provided the very clarification that might have occurred if the court of appeals had vacated the challenged EPA action on the ground of internal inconsistency and had remanded for further administrative proceedings. Whether or not such a remand would have been appropriate at an earlier stage of the case, it is therefore unwarranted now.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 1536 of Title 16 provides:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or

license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

> (A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;
>
> (B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and
>
> (C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

> (i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant,

before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in

accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed

travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action

which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an

exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of

the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in

accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any

biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(*l*) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant

may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by

the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172].

and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

2. Section 1342 of Title 33 provides:

National pollutant discharge elimination system.

* * * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the is-

suance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a sub-

stantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

* * * * *

3. Section 402.02 of Title 50 Code of Federal Regulations provides:

Definitions

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR Parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of

all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11-1712.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate

to minimize the impacts, i.e., amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

4. Section 402.03 of Title 50 Code of Federal Regulations provides:

Applicability.

Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

5. Section 402.14 of Title 50 Code of Federal Regulations provides:

Formal Consultation

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accor-

dance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)-(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits com-

ments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opin-

ion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.*

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraph (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the

issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

7701

Nos. 06-340 and 06-549

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPENING BRIEF OF PETITIONERS NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*

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QUESTIONS PRESENTED

1. Whether a court can append additional criteria to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), by requiring State NPDES programs to include protections for endangered species.

2. Whether Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), overrides statutory mandates or constraints imposed on an agency's discretion by other Acts of Congress.

3. Whether Section 7(a)(2) of the Endangered Species Act constitutes an independent source of authority, requiring federal agencies to take affirmative action to benefit endangered species even when an agency's enabling statutes preclude such action.

4. Whether the court of appeals incorrectly applied the holding of *Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004), in concluding that EPA's approval of Arizona's NPDES program was the legally relevant cause of impacts to endangered species resulting from future private land use activities.

5. Whether the court of appeals correctly held that EPA's decision to transfer permitting authority to Arizona under Section 402(b) of the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and, if so, whether the court of appeals should have remanded to EPA for further proceedings without ruling on the interpretation of Section 7(a)(2).

PARTIES TO THE PROCEEDING

Petitioners are National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce and American Forest & Paper Association ("Home Builders"), and the U.S. Environmental Protection Agency.

Respondents are Defenders of Wildlife, Center for Biological Diversity and Craig Miller.

Other parties before the court of appeals were the U.S. Fish and Wildlife Service and the State of Arizona.

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OPINIONS BELOW

The opinion of the court of appeals and the dissent (Pet. App. 1-68) are reported at 420 F.3d 946. The order denying the petitions for panel rehearing and rehearing *en banc*, the dissents from the denial of rehearing, and the concurrence (Pet. App. 134-58) are reported at 450 F.3d 394.

JURISDICTION

The court of appeals entered judgment on August 22, 2005, and denied rehearing and *en banc* rehearing on June 8, 2006. Home Builders timely filed their petition for a writ of certiorari on September 6, 2006. The U.S. Environmental Protection Agency (EPA) was granted extensions of the filing deadline, and timely filed its petition for a writ of certiorari on October 23, 2006. The Court granted and consolidated the petitions on January 5, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1251-1387, the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and those statutes' implementing regulations are set out in an appendix to this brief.

STATEMENT

This case concerns the relationship between two major environmental laws, the Clean Water Act (CWA) and the Endangered Species Act (ESA), and the authority of the agencies that administer those laws, EPA and the U.S. Fish and Wildlife Service (FWS). On December 5, 2002,

EPA approved the State of Arizona's application to administer the National Pollutant Discharge Elimination System (NPDES) program under Section 402(b) of the CWA, 33 U.S.C. § 1342(b). Section 402(b) states that EPA "shall approve each submitted [State] program" unless it "determines that adequate authority does not exist" for the State to administer the program in compliance with nine specified criteria. There was and is no dispute that Arizona's program satisfied those criteria and EPA's implementing regulations.

Respondents (Defenders) instead contended that EPA violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), because EPA did not sufficiently analyze the effects of the loss of, nor require a sufficient substitute for, consultation with FWS when discharge permits are issued. Section 7(a)(2) requires each Federal agency to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat" designated for such species. See, *e.g.*, *Bennett v. Spear*, 520 U.S. 154, 158 (1997) (describing the consultation process).

A majority of the court of appeals' panel agreed with Defenders and vacated EPA's approval of Arizona's program. The court acknowledged that EPA lacked authority under the CWA to act for the benefit of listed species in approving State NPDES program submissions. Pet. App. 53. The court instead redefined and expanded the obligations of Federal agencies under the ESA, holding: (1) Section 7(a)(2) grants independent authority to Federal agencies to act for the benefit of listed species; (2) such authority overrides any conflicting mandates imposed by Congress in other statutes; and (3) any "authorizing action" by Federal agencies creates an

obligation to exercise this new-found authority. *Id.* at 30-44. Circuit Judge Kozinski, who dissented with five other judges from the denial of rehearing, explained: "the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes." *Id.* at 137.

1. The Clean Water Act and the NPDES Program

Congress enacted the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress also stated:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources. . . . *It is the policy of Congress that States . . . implement the permit programs under sections 402 and 404 of this Act.*

33 U.S.C. § 1251(b) (emphasis supplied); see also *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (*SWANCC*) (the extension of jurisdiction under the CWA to isolated, intrastate waters "would result in a significant impingement of the States' traditional and primary power over land and water use").

Section 301 of the CWA provides that "the discharge of any pollutant by any person shall be unlawful" except as authorized by one of several regulatory programs established by the Act. 33 U.S.C. § 1311(a).[1] One of the

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[1] A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A); see also *id.* at § 1362(16). The term "pollutant" is broadly defined to include, *inter alia*, solid waste; industrial, municipal and

(Continued on following page)

primary regulatory programs established by the CWA is the NPDES program, under which either EPA or an authorized State issues permits authorizing "the discharge of any pollutant, or combination of pollutants" from point sources. *Id.* at § 1342(a)(1). "Generally speaking, the NPDES [program] requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (summarizing the NPDES program); see also *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-08 (1976) (describing the Federal Water Pollution Control Act Amendments of 1972 and the requirements imposed under the NPDES program); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109-11 (D.C. Cir. 1987) (*NRDC I*) (describing CWA water quality standards). Regardless of whether the issuing authority is EPA or a State, an NPDES permit must contain the same terms, conditions and requirements. 33 U.S.C. § 1342(a)(3).

The NPDES program allows individual permits issued on a site-specific basis to permit discharges from sources such as industrial plants and wastewater treatment facilities. In cases in which a large number of point source discharges are expected to be similar in nature, EPA may authorize such discharges under general permits, which cover an entire category or group of discharges and are developed by EPA through notice-and-comment proceedings similar to rulemaking. See 40 C.F.R. § 122.28. General permits are used extensively in permitting storm water discharges produced by various municipal and

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agricultural waste; sewage sludge; biological and radioactive materials; and sand and cellar dirt. *Id.* at § 1362(6). A "point source" is "any discernible, confined and discrete conveyance." *Id.* at § 1362(14). Finally, the CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* at § 1362(7).

industrial activities, including construction projects larger than one acre. 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26; see also *Texas Indep. Prod. and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 967-68 (7th Cir. 2005) (describing EPA's general permit system for storm water discharges). Facilities seeking coverage under a general permit must submit a notice of intent describing the nature of the facility, where it is located, and why the facility qualifies for coverage under the general permit, and must comply with the terms and conditions of the permit. 40 C.F.R. § 122.28(b)(2); see also *Texas Indep. Prod.*, 410 F.3d at 968-69 (discussing EPA's current general permit for discharges from construction sites).[2]

2. The States' Authority to Administer the NPDES Program

Under the CWA, each State has the right to administer the NPDES program if the State's program satisfies the criteria in Section 402(b). Section 402(b) of the CWA provides:

> [T]he governor of each State desiring to administer its own permit program for discharges into the navigable waters within its jurisdiction may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law . . . . *The Administrator* ***shall approve*** *each such submitted program* ***unless*** *he determines that adequate authority does not exist*

[2] A large portion of the permits issued in Arizona relate to storm water discharges from construction sites. Pet. App. 49 n.22. The "pollutant" is typically loose soil washed from an unstabilized construction site during a period of heavy rain, and the "navigable water" is a desert wash.

> [to administer the program in compliance with nine specific criteria].

33 U.S.C. § 1342(b) (emphasis supplied); see also 40 C.F.R. §§ 123.1(c), 123.61(b); *EPA v. California,* 426 U.S. at 208. Indeed, Congress' policy statement in 33 U.S.C. § 1251(b) specifically provides that the States are to implement the NPDES program.[3]

The nine criteria in Section 402(b) relate specifically to administering the NPDES program. For example, the State's program must contain adequate authority for the State to issue permits that meet minimum regulatory requirements under the CWA; ensure that the public, affected States and EPA receive notice of permit applications; provide an opportunity for public comment and a hearing on permit decisions; and provide adequate enforcement authority, including authority to impose fines and penalties for violations. 33 U.S.C. § 1342(b)(1)-(9); see also 40 C.F.R. §§ 123.21-123.30 (describing the required elements of a State's program submission). In addition, the State program must meet guidelines adopted by EPA under Section 304(i), 33 U.S.C. § 1314(i), which "establish[] the minimum procedural and other elements of any State program" under Section 402, including monitoring, reporting, enforcement, funding and manpower requirements.[4]

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[3] The States have additional authorities and responsibilities under the CWA, such as the development of water quality standards and certifying that discharges resulting from federal licenses and permits will not violate water quality standards. 33 U.S.C. §§ 1313(c), 1341; see also *S.D. Warren Co. v. Bd. of Envtl. Prot.*, ___ U.S. ___, 126 S.Ct. 1843, 1846-47 (2006); *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700, 704-08 (1994).

[4] EPA has promulgated regulations containing these guidelines (as well as implementing Section 402(b)), which are codified at 40 C.F.R. pt. 123.

Under CWA Section 402(c), EPA must act on a State's application within 90 days of submission and suspend the issuance of Federal permits unless EPA determines that the State permit program does not meet the requirements of Section 402(b) or does not conform to the Section 304(i) guidelines. 33 U.S.C. § 1342(c)(1). EPA's regulation governing the approval process similarly provides that within 90 days of receiving a complete program submission, EPA must approve or disapprove the State's program. 40 C.F.R. § 123.61(b).

As the foregoing discussion suggests, EPA does not actually "transfer" or "delegate" authority to the States. Instead, the States administer their own NPDES programs, established under each State's laws, subject to EPA's oversight authority. Following approval, the State must comply with Section 402(b) and EPA's Section 304(i) guidelines. 33 U.S.C. § 1342(b). If a State fails to comply, EPA, after public hearing, may order the State to take corrective action or withdraw approval of its program. *Id.* at § 1342(c)(3). The State also must transmit copies of each permit application to EPA and provide notice to EPA of every action taken concerning an application, including each NPDES permit the State proposes to issue. *Id.* at § 1342(d)(1); 40 C.F.R. §§ 123.43, 123.44. EPA may veto a proposed State permit "as being outside the guidelines and requirements" of the CWA by objecting in writing within 90 days of the date of permit's transmittal. 33 U.S.C. § 1342(d)(2); see also *Save the Bay, Inc. v. Admin. of EPA*, 556 F.2d 1282, 1284-87 (5th Cir. 1977) (discussing the legislative history of the Federal Water Pollution Control Act Amendments of 1972 and the respective roles of EPA and the States in administering the NPDES program).

3. The Endangered Species Act and the Section 7 Consultation Process

The ESA delegates regulatory authority to the Secretaries of Interior and Commerce. 16 U.S.C. § 1532(15). The Secretaries in turn have delegated their ESA authority so that the ESA is administered by FWS (for the Interior Department) with respect to terrestrial and some aquatic species, and by the National Marine Fisheries Service (NMFS) (for the Commerce Department) with respect to marine and certain anadromous species. See 50 C.F.R. §§ 17.2(b), 402.01.[5]

Under the ESA, protected species of wildlife, fish and plants are classified as endangered or threatened species through a notice-and-comment rulemaking process prescribed by Section 4 of the ESA and are placed on lists published in the Code of Federal Regulations. 16 U.S.C. § 1533(a)(1) & (c); see also 16 U.S.C. § 1532(6), (16) & (20) (definitions of "endangered species," "species" and "threatened species"); 50 C.F.R. pt. 424 (regulations governing listing and critical habitat designation). A similar rulemaking process is prescribed under Section 4 for the designation of listed species' critical habitat. 16 U.S.C. § 1533(a)(3) & (c); see also 16 U.S.C. § 1532(5) (definition of "critical habitat"); 50 C.F.R. pt. 424.[6]

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[5] Home Builders will focus on FWS in the following discussion because that agency was involved in the administrative and court proceedings below. NMFS's responsibilities under the ESA and its implementing regulations are generally identical to those of FWS. In discussing both agencies, Home Builders will refer to the "Services."

[6] The species' lists are found at 50 C.F.R. §§ 17.11 (wildlife and fish) and 17.12 (plants). The statutory process is commonly called "listing," and endangered and threatened species are often called "listed species." This terminology will be used in Home Builders' brief.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires each Federal agency, "in consultation with and with the assistance of the Secretary," to ensure that "any action authorized, funded or carried out" by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" designated as critical. The Services' joint regulations implementing Section 7, codified at 50 C.F.R. pt. 402, provide that Section 7 applies "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Thus, discretionary Federal actions are prohibited if they would jeopardize the existence of a listed species or destroy or adversely modify designated critical habitat, unless an exemption is granted under Section 7(h), 16 U.S.C. § 1536(h).[7]

The process by which Federal agencies satisfy their obligation to avoid jeopardy is referred to as Section 7 "consultation." A Federal agency must initially determine whether its proposed action "may affect" listed species or critical habitat. See 50 C.F.R. § 402.14(a). If the action will *not affect* any listed species or critical habitat, the agency may proceed without consultation. See *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005) (affirming "no effect" determinations made by the Army Corps of Engineers).

If the Federal agency believes that its proposed action is *not likely to adversely affect* the listed species or designated critical habitat, the agency may request that FWS concur with its evaluation. If FWS concurs, no additional consultation is required, and no biological

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[7] This prohibition applies only to species' habitat that has been formally designated as "critical" under Section 4 of the ESA. See *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001).

opinion is prepared. This is known as informal consultation. See 50 C.F.R. §§ 402.13, 402.14(b)(1). If the proposed Federal action is *likely to adversely affect* listed species or designated critical habitat, however, formal consultation is required, during which a more thorough evaluation of the proposed action is undertaken. *Id.* at §§ 402.12(k), 402.14(a).[8]

Following the completion of formal consultation, FWS provides a biological opinion to the Federal agency. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g) & (h). A biological opinion "alters the legal regime to which the action agency is subject," and exposes the agency (as well as any permit or license applicant) to potential liability. *Bennett*, 520 U.S. at 169-70. If a "jeopardy" biological opinion is proposed, FWS will recommend reasonable and prudent alternatives to the proposed action. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). To be "reasonable and prudent," an alternative must be consistent with the intended purpose of the action, within the Federal agency's legal authority and jurisdiction, and economically and technologically feasible. 50 C.F.R. § 402.02. When a "jeopardy" biological opinion is issued, the action agency can either implement FWS's reasonable and prudent alternatives (thereby avoiding jeopardy), terminate the proposed action altogether, or seek an exemption from the Endangered Species Committee allowing the proposed action to proceed.[9]

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[8] Most consultations are concluded informally. During fiscal year 1999, for example, FWS informally consulted on about 12,000 actions, while conducting 83 formal consultations and issuing one "jeopardy" opinion. Terry Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin* 10, 11 (Nov./Dec. 1999), available at http://www.fws.gov/endangered/esb/99/11-12/10-11.pdf (visited Feb. 7, 2007).

[9] The Endangered Species Committee is chaired by the Secretary of the Interior, and includes cabinet-level officials and a presidential appointee representing each State affected by the application. 16 U.S.C.

(Continued on following page)

4. EPA's Previous Practice in Approving State NPDES Programs

Since the ESA was enacted in 1973, EPA has rarely consulted with the Services in approving State NPDES program submissions. Prior to Arizona's NPDES program submission in 2002, EPA consulted with the Services on only six occasions, beginning with the approval of South Dakota's application in 1993. Pet. App. 7 n.3. In contrast, EPA did *not* consult in approving programs for 39 other states. *Ibid.* Moreover, a number of those States have received multiple program approvals, resulting in more than 100 opportunities to consult under Section 7(a)(2). See *Approval of Application by Texas to Administer the NPDES Program*, 63 Fed.Reg. 51,164, 51,200 (Sept. 24, 1998) (table listing State NPDES program status).[10]

On the occasions when it consulted with the Services, EPA did not acknowledge it was legally obligated to do so or that Section 7(a)(2) applied to State NPDES program approvals. For example, in its notice approving Oklahoma's program, EPA explained:

> While it may not be clear that the section 7 consultation is specifically required for a program authorization, ESA and its implementing regulations do not restrict any agency from

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§ 1536(e). Following a threshold investigation and a hearing, the committee may grant the exemption if it determines that there are no reasonable and prudent alternatives available; the benefits of action outweigh the benefits of alternative courses and are consistent with conserving the species or its critical habitat; and the action is in the public interest and is of regional or national importance. *Id.* at § 1536(g) & (h).

[10] As shown in the table, multiple approvals are the result of States seeking approval to administer different portions of the NPDES program at different times. See 33 U.S.C. § 1342(n). The total number of State program approvals prior to 1993 is 114.

> voluntarily consulting and conferring with [FWS] on actions it believes may affect listed species.

Approval of Application by Oklahoma to Administer the NPDES Program, 61 Fed.Reg. 65,047, 65,051 (Dec. 10, 1996). More recently, in connection with approving Texas' NPDES program, EPA explained that "even if [it] was not required by law to consult with the Services, EPA believes it was within its discretion to do so." *Approval of Application by Texas*, 63 Fed.Reg. at 51,198. As the foregoing statements suggest, EPA did not have a formal policy on the applicability of Section 7(a)(2) to State program approvals prior to acting on Arizona's NPDES program submission.

Moreover, formal consultation between EPA and the Services, resulting in a biological opinion, occurred only two times before this case.[11] In both instances, the scope of the consultation was limited to aquatic species, *i.e.*, species affected by surface water quality. In the case of Maine's NPDES program, EPA consulted on two listed species: with NMFS on the effect of salmon fish farms and hatcheries on listed, wild Atlantic salmon, and with FWS on the effect of NPDES permits for six paper mills on bald eagles. *Approval of Application by Maine to Administer the NPDES Program*, 66 Fed.Reg. 12,791, 12,793-94 (Feb. 28, 2001). In the case of Texas' NPDES program, the

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[11] The consultations on the South Dakota, Florida, Louisiana and Oklahoma NPDES programs were informal, *i.e.*, the Services concurred with EPA's "not likely to adversely affect" determination, and no biological opinions were prepared. See *Approval of Application by South Dakota to Administer the NPDES Program*, 59 Fed.Reg. 1,535, 1,543 (Jan. 11, 1994); *Approval of Application by Florida to Administer the NPDES Program*, 60 Fed.Reg. 25,718, 25,719 (May 12, 1995); *Approval of Application by Louisiana to Administer the NPDES Program*, 61 Fed.Reg. 47,932, 47,934 (Sept. 11, 1996); *Approval of Application by Oklahoma*, 61 Fed.Reg. at 65,053.

consultation also was limited to species affected by the enforcement of surface water quality standards. *Approval of Application by Texas*, 63 Fed.Reg. at 51,201. EPA explained that no "obligations, procedural or otherwise," were imposed on Texas to protect listed species: "The State's only obligation is to issue permits that comply with the procedural and substantive requirements of the CWA and the State program approved by EPA." *Id.* at 51,198.

In January 2001, the Services and EPA entered into a memorandum of agreement to improve interagency coordination under the CWA and the ESA. *Memorandum of Agreement Between EPA, FWS and NMFS Regarding Enhanced Coordination Under the CWA and ESA; Notice*, 66 Fed.Reg. 11,202 (Feb. 22, 2001) (Pet. App. 245-317) (the National MOA). The operative portion of the National MOA, however, does not address whether Section 7(a)(2) applies to State NPDES program approvals. See Pet. App. 268-317. The Federal Register preamble (not the National MOA itself) states only that EPA's current practice is to consult with the Services, that such consultations are conducted on a case-by-case basis, and that the National MOA does *not* place any conditions on approval of State NPDES programs. *Id.* at 260, 266. Instead, the National MOA emphasizes that "EPA's oversight of State/Tribal permits will continue to be governed by EPA's CWA authorities. For example, EPA may only object to a permit that is 'outside the guidelines and requirements' of the CWA . . . ." *Id.* at 265 (quoting 33 U.S.C. § 1342(d)(2)); see also *id.* at 308-12 (coordination procedures for State and Tribal permits).

5. The Administrative Proceedings Concerning Arizona's NPDES Program Submission

On December 20, 2001, the Governor of Arizona requested NPDES program approval pursuant to Section 402(b). *Id.* at 546-47; see also *id.* at 80-82 (timeline of events). EPA's regional office in San Francisco (Region 9), which is responsible for the administration of the CWA in Arizona, received the State's submission package on January 14, 2002, but determined that Arizona's submission did not meet certain requirements. J.A. 10-26; Pet. App. 547. On June 5, 2002, the Governor of Arizona requested partial program approval, and a revised program was submitted to EPA. Pet. App. 547. On July 11, 2002, EPA declared that Arizona's program submission was administratively complete. J.A. 34; Pet. App. 547. EPA was required to approve or disapprove Arizona's program by October 8, 2002. J.A. 327; see also 33 U.S.C. § 1342(c) (deadline for acting on State program submissions); 40 C.F.R. § 123.61(b) (same).

On January 23, 2002, EPA contacted FWS's Arizona field office and requested initiation of informal consultation regarding approval of Arizona's NPDES program. J.A. 7-10. EPA indicated the permitting activities that Arizona's program would cover, and requested a list of species and critical habitat that those activities would affect. *Ibid.* Informal consultation between the agencies apparently continued into June 2002. See Pet. App. 80, 597.

EPA subsequently prepared a biological evaluation of the impacts of approving Arizona's program, and concluded such action would not adversely affect any listed species or their critical habitat. *Id.* at 583-623. EPA submitted the final evaluation to FWS on June 21, 2002. *Id.* at 581. In its biological evaluation, EPA concluded that no adverse effects would occur and formal consultation was unnecessary:

> The Federal action is *an administrative shift of authority* and is not associated with any physical action that will alter habitat or affect biota. The substantive CWA protections currently afforded to Federally-listed species and critical habitat under the NPDES program will continue under the [State] permit program. USEPA oversight of the [State] program, including coordination pursuant to the National MOA, will provide added assurance of this continued protection. . . . Therefore, the USEPA concludes that its proposed approval of the [State] program is not likely to adversely affect any Federally-listed species or their designated critical habitat.

Id. at 617-18 (emphasis supplied).

A dispute immediately developed between EPA Region 9 and FWS's Arizona field office in Phoenix. FWS field office employees complained that approval of Arizona's NPDES program would allow "unchecked" real estate development to occur, reducing the conservation status of the cactus ferruginous pygmy-owl, and two plant species, the Pima pineapple cactus and Huachuca water umbel. J.A. 46. The FWS employees disagreed with EPA's determination that approval of Arizona's program was merely an administrative shift in authority, asserting instead that private construction is an "indirect effect" of NPDES permits and objecting to EPA's refusal to "federalize" State permits "where the activity causing the discharge adversely affects an upland species" or may cause "decreases in water quantity." *Id.* at 45-46.

On August 20, 2002, the acting supervisor of FWS's Arizona field office acknowledged his agency's receipt of EPA's biological evaluation and request to initiate formal consultation, but requested additional information. J.A.

55-57. He also informed EPA that the 135-day period for consulting (see 50 C.F.R. § 402.14(e)) would not begin until EPA provided this information. *Id.* at 56-57. EPA immediately responded and pointed out that the information had been provided in EPA's June 21, 2002 submission. J.A. 59-63.

On September 13, 2002, a meeting took place between representatives of EPA, FWS and the Arizona Department of Environmental Quality (ADEQ) to address the interagency dispute. See J.A. 120. FWS was uncertain whether formal consultation had been initiated. *Ibid.* FWS maintained that the consultation should cover impacts to upland (terrestrial) species caused by private land uses and impacts to water quantity resulting from groundwater pumping. EPA, in contrast, maintained that it lacked authority to regulate those activities:

> We then discussed our concerns with aquatic and aquatic-dependent species. We all agreed that the process defined in the [National] MOA would address aquatic concerns, but we [FWS] expressed concerns about issues of water *quantity* .... EPA stated that effects from pumping groundwater to provide water to housing developments is out of their jurisdiction and they have no discretion to modify or condition permits for this type of effect.
>
> At this point, EPA voiced their opinion on indirect effects from their action. They believe there are no indirect effects associated with the delegation [*sic*] because it is simply an administrative action. We disagree with their interpretation and told them that we have to evaluate all the effects (direct, indirect, interrelated and interdependent) *regardless of whether they could do anything about those effects*.

Id. at 121 (emphasis supplied).

At this point, the agencies decided to elevate their dispute to their respective Washington headquarters for resolution. *Id.* at 123. In the October 4, 2002 interagency elevation document, FWS's position was summarized as follows:

> FWS is concerned that, following EPA Region 9's approval action, endangered species, in particular, the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and perhaps other species, will be adversely impacted in the future by projects that will require State NPDES permits issued by the State of Arizona. The FWS's concerns involve the indirect effects of permit issuance from *non-water-quality-related impacts* from these projects, such as construction, water usage, and similar activities that affect individuals of the species either directly or through disturbance of their habitat. *The concerns do not involve water quality issues related to the discharges that will be regulated under the State NPDES permits.*
>
> . . . FWS maintains that EPA needs to ensure that a consultation process, or alternative process similar to that which exists, remains in place following the approval of the State program to address effects to listed species.

Pet. App. 562-63 (emphasis supplied). EPA, in contrast, continued to stress its limited authority and the administrative nature of approving Arizona's NPDES program:

> EPA Region 9 believes that it does not have legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS . . . .

> EPA Region 9 also believes that its approval action, which is an administrative transfer of authority, is not the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits.

Id. at 564.

The agencies' headquarters resolved the dispute. On December 3, 2002, FWS issued its biological opinion, concluding that EPA's approval of Arizona's NPDES program is not likely to jeopardize listed species or adversely modify designated critical habitat. *Id.* at 77-124. FWS acknowledged EPA's jurisdiction under the CWA, stating that the scope of the consultation was limited to listed species and critical habitat "in, adjacent to, or dependent on surface waters in Arizona." *Id.* at 77; see also *id.* at 108. FWS explained that the proposed action constituted an administrative shift in authority and would not cause increases in requests for CWA permits or real estate development. *Id.* at 113-14. FWS also accepted EPA's description of its regulatory authority under the CWA, including EPA's inability to object to NPDES permits "based on grounds other than guidelines and requirements of the CWA." *Id.* at 114; see also 33 U.S.C. § 1342(d)(2). Finally, FWS concluded that the environmental impacts of future real estate development in Arizona are speculative, and cannot be considered reasonably certain to occur. Pet. App. 114-15; see also 50 C.F.R. § 402.02 (definition of "effects of the action").

On December 5, 2002, EPA approved Arizona's program. J.A. 190-91; Pet. App. 69-76. Approval occurred nearly two months after the deadline for acting on State program submissions had passed. Since EPA's approval decision, ADEQ has been administering and enforcing the NPDES program (known as the AZPDES program) in all portions of Arizona other than Native American land.

As both the interagency elevation document and biological opinion indicate, the two principal species of concern during the consultation were the cactus ferruginous pygmy-owl and the Pima pineapple cactus. See, *e.g.*, Pet. App. 115, 562. The pygmy-owl is an upland species, and its habitat is not dependent on surface water quality. See *National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 838 (9th Cir. 2003). FWS has removed the Arizona pygmy-owl population from the list of endangered and threatened species because the population does not qualify as a "distinct population segment" and is therefore not eligible for listing. *Final Rule to Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl From the Federal List of Endangered and Threatened Wildlife*, 71 Fed.Reg. 19,452 (April 14, 2006); see also *Defenders of Wildlife v. Flowers*, 414 F.3d at 1070-71 & n.1; *National Ass'n of Home Builders*, 340 F.3d at 852. The Pima pineapple cactus is a species of desert cactus found in southern Arizona and northern Sonora, and is not associated with wetlands or watercourses.[12] The listing status of this cactus is currently being reviewed to determine whether it is a valid taxonomic entity. See *Notice of Status Review*, 70 Fed.Reg. 5,460, 5,461-62 (Feb. 2, 2005).[13]

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[12] See FWS background documents available at http://www.fws.gov/southwest/es/arizona/pima.htm (visited Feb. 6, 2007).

[13] Several other listed species are mentioned in the administrative record, including fish and other aquatic species. For example, the Huachuca water umbel, a wetland plant species, was discussed in the FWS field employees internal briefing statement. See J.A. 49. However, FWS's concerns related to water use in the Sierra Vista area rather than discharges of pollutants impairing the species' habitat. *Ibid.*; see also J.A. 121. The record makes clear that EPA and FWS agreed that approval of Arizona's program would have no adverse, water quality-related impacts on those species. See, *e.g.*, Pet. App. 562-63.

6. The Court Proceedings Below

On April 2, 2003, Defenders filed a petition with the court of appeals seeking review of EPA's approval of Arizona's program. See 33 U.S.C. § 1369(b)(1)(D) (providing for review in the circuit courts of EPA's determinations regarding State permitting programs); J.A. 257-69. Defenders never contended that Arizona's application or the AZPDES program failed to meet the nine criteria set forth in CWA Section 402(b). Instead, Defenders alleged that EPA violated Section 7(a)(2) of the ESA in approving Arizona's program. J.A. 258-61; Pet. App. 13. Home Builders, which consist of industry and trade associations representing the interests of Arizona businesses required to obtain NPDES permits, were granted permission to intervene as respondents. Pet. App. 13; see also J.A. 270-311.

Defenders also filed an amended complaint in a pending action in district court challenging FWS's biological opinion under the Administrative Procedure Act. Pet. App. 13. The district court determined that it lacked jurisdiction to decide Defenders' challenge to the FWS's biological opinion, and ordered that the claim be severed and transferred to the Ninth Circuit. *Ibid*; see also J.A. 312-20. The court of appeals consolidated the cases and issued its opinion on August 22, 2005.

A majority of the court of appeals' panel held that FWS's biological opinion was "fatally deficient" and that EPA "fail[ed] to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat." Pet. App. 47-48, 60. The court acknowledged that CWA Section 402(b) foreclosed EPA's discretion to act for the benefit of listed species. *Id.* at 53. The court held instead that ESA Section 7(a)(2) grants *independent authority* to federal agencies to act for the benefit of listed

species, that such authority overrides any constraints imposed by Congress in the CWA, and that any "authorizing action" creates an obligation to exercise this authority. *Id.* at 38-39, 53.

To support this holding, the court focused on the phrase "insure that any action . . . is not likely to jeopardize" in Section 7(a)(2), concluding Congress intended this phrase to grant Federal agencies authority to act affirmatively to benefit listed species, rather than prohibiting actions that jeopardize species. *Id.* at 30-38. The majority also determined that whenever a Federal agency authorizes, funds or carries out an action, Section 7(a)(2) applies: "the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation *and action* requirements." *Id.* at 43-44 (emphasis supplied).

The court concluded that EPA needed to address "whatever harm may flow from the loss of section 7 consultation" (*id.* at 47), notwithstanding EPA's non-discretionary obligation to approve Arizona's NPDES program under CWA Section 402(b). In the court's view, EPA could not approve Arizona's program, even if that program satisfied CWA Section 402(b), unless EPA found "sufficient substitutes for section 7's consultation and mitigation mandates." *Id.* at 52. As the remedy, the court vacated EPA's approval of Arizona's program, relying primarily on future adverse impacts on the cactus ferruginous pygmy-owl. *Id.* at 61-63.

Senior Circuit Judge Thompson dissented, stating that "EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not 'agency action' within the meaning of Section 7 of the [ESA]." *Id.* at 66. Judge

Thompson explained that prior Ninth Circuit opinions recognized, in accordance with 50 C.F.R. § 402.03, that Section 7(a)(2) applies only to actions in which an agency has discretion to act for the benefit of listed species. *Id.* at 64-66 (citing numerous opinions). The dissent also pointed out that the majority's interpretation was in direct conflict with other circuits' interpretation of CWA 402(b), which have held that EPA's obligation in reviewing a State's program submittal under CWA Section 402(b) is limited to evaluating the statute's nine criteria. *Id.* at 66-67.

Home Builders, EPA and FWS, and the State of Arizona filed petitions seeking rehearing *en banc* based on the intra-circuit and inter-circuit conflicts created by the majority's opinion. On June 8, 2006, the court of appeals issued its order denying both panel and *en banc* rehearing. *Id.* at 134-58. Six circuit judges dissented from the denial of rehearing on multiple grounds. *Id.* at 135-49. Circuit Judge Kozinski stated, for example, "the majority tramples all over the [FWS's] reasonable interpretation of the ESA, deliberately creates a square inter-circuit conflict with the Fifth and D.C. Circuits, and ignores at least six prior opinions of our own court." *Id.* at 135-36.

SUMMARY OF ARGUMENT

No dispute exists that: (1) Arizona's NPDES program submission satisfied the nine requirements specified by Congress in Section 402(b) of the CWA as well as EPA's implementing regulations; and (2) the plain language of Section 402(b) forecloses EPA's discretion to act for the benefit of listed species in approving a State's program. Nonetheless, the court of appeals held that the ESA overrides the Congressional mandates set forth in the CWA. That holding is erroneous for several reasons:

(1) The court of appeals ignored the plain language of CWA Section 402(b), which states that EPA "*shall approve*" a State's NPDES program "*unless*" one or more of nine specified criteria are not met. Congress' "shall/unless" phrasing was deliberate and precludes the consideration of other criteria, including impacts to listed species. The court treated ESA Section 7(a)(2) – a statute of general applicability – as implicitly repealing Congress' mandatory direction in the CWA, upsetting the Federal-State balance struck by the CWA.

(2) The court of appeals improperly disregarded the Services' regulation, 50 C.F.R. § 402.03, limiting the applicability of Section 7(a)(2) to actions in which there is *discretionary* Federal involvement or control. The Services' regulation was adopted in 1986 following notice-and-comment rulemaking, and has been in effect for over 20 years. Section 7(a)(2) is ambiguous, as shown by the conflict between the Ninth Circuit and other circuits, and the Services' interpretation is reasonable, as shown by those circuits' decisions interpreting Section 7(a)(2)'s application. Nevertheless, the court gave no deference to 50 C.F.R. § 402.03, and improperly substituted its view of how Section 7(a)(2) should apply.

(3) Rather than following the plain language of CWA 402(b) or deferring to the Services' long-standing interpretation of Section 7(a)(2), the court of appeals erroneously interpreted Section 7(a)(2) as granting authority to Federal agencies that must be exercised whenever an agency authorizes, funds or carries out an activity. To support this holding, the court incorrectly applied *TVA v. Hill*, 437 U.S. 153 (1978), ignoring that case's factual context and the narrow questions presented to this Court. *TVA v. Hill* involved a discretionary public works project carried out by a Federal instrumentality, and there was no dispute that completion of the project would eradicate a listed species and destroy its designated

critical habitat. The court also incorrectly construed the ESA's legislative history, ignoring Congress' stated policy in ESA Section 2(c)(1) that agencies are to "use their authorities in furtherance of" the Act.

(4) In determining the effects of EPA's action, the court of appeals facially adopted but failed to follow *Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004), which held that a Federal agency cannot be considered the legally relevant cause of an environmental effect that it lacks authority to control. The court concluded that EPA's approval of Arizona's NPDES program was the "but for" cause of impacts to listed species resulting from future private land use activities. That conclusion was based on the court's erroneous belief that EPA, when issuing an NPDES permit, has authority to regulate how private land is used, which conflicts with the CWA's basic framework and EPA's jurisdiction under CWA Section 402, which gives EPA authority to regulate and control discharges of pollutants – not real estate development.

(5) The record shows that EPA consistently maintained that its authority under the CWA is limited and that EPA complied with that Act in approving Arizona's NPDES program. Because the questions before the Court involve the interpretation of Federal statutes and their implementing regulations, remand to the EPA would add nothing to the record, particularly given that EPA and the Services now have adopted a formal policy governing approval of State NPDES programs.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 402(b) OF THE CLEAN WATER ACT PRECLUDES THE APPLICATION OF THE ENDANGERED SPECIES ACT TO EPA'S APPROVAL OF STATE NPDES PROGRAMS.

A. The Criteria Specified by Congress in Section 402(b) of the Clean Water Act Are Exclusive and EPA Must Approve State NPDES Programs Meeting Those Criteria.

The plain language of CWA Section 402(b) requires EPA to approve State NPDES programs if nine specific criteria are met. None of those criteria mentions protection of listed species or the ESA. As Judge Kleinfeld explained, in dissenting from denial of rehearing, this case should have been simple: "[Section 402(b)] is mandatory. Congress commands that the agency 'shall approve' state programs 'unless' one or more of nine conditions are not met. The 'shall/unless' formula makes the nine condition list exclusive, and courts cannot add conditions to the list." Pet. App. 149. The mandatory nature of Section 402(b) is supported by Congress' express policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and, moreover, "that the States manage" the NPDES program. 33 U.S.C. § 1251(b).

In addition, the legislative history shows that Congress deliberately chose the mandatory "shall/unless" phrasing found in Section 402(b)(2). The bills originally enacted by each house contained different language, with the Senate's bill allowing, but not requiring, EPA to approve State programs. Compare H.R. Conf. Rep. No. 92-1465, at 138 (1972) ("[u]nder section 402, the Administrator *can* delegate permit authority to a State if the State program is adequate"; describing Senate Bill

2770 (1972) (emphasis supplied)) with *id.* at 139 ("the Administrator is *required to approve* a submitted State program *unless* he finds that there is not adequate authority . . . "; describing House Bill 11896 (1972) (emphasis supplied)). The Conference Committee substituted the House of Representatives' amendment, resulting in Section 402(b)'s mandatory direction. *Id.* at 139; see also *EPA v. California,* 426 U.S. at 208.

This Court interpreted similar statutory language in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), holding that "shall" means "shall." There, the Court considered EPA's obligation to approve state implementation plans under Section 110(a)(2) of the Clean Air Act, 42 U.S.C. § 7410(a)(2):

> The provision sets out eight statutory criteria that [a State's] implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. *The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified,* . . . and none of the eight factors appears to permit consideration of technological or economic infeasibility.

Union Electric, 427 U.S. at 257 (citation omitted; emphasis supplied).

In *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297-99 (5th Cir. 1998) (*AFPA*), the Fifth Circuit squarely addressed the mandatory nature of CWA Section 402(b) in connection with a challenge to EPA's approval of Louisiana's NPDES permitting program. As a condition of approval, EPA required Louisiana to submit proposed permits to the Services, which EPA would veto if either FWS or NMFS determined that the permit would adversely impact listed species. *AFPA*, 137 F.3d at 293-94. The Fifth Circuit held EPA lacked authority under

the CWA to impose conditions to benefit listed species, explaining:

> [Section 402(b)'s] plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command "shall approve," § 304(i) cannot be construed to allow EPA to expand the list of permitting requirements. Applying *Chevron*, we conclude that Congress *has* spoken directly to the precise question at issue: EPA's discretion lies not in modifying the list of enumerated criteria, but simply in ensuring that those criteria are met.

Id. at 298 (following *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)) (emphasis in original); see also *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (*NRDC II*) (Section 402(b) "commands" EPA to "approve the state permit system" once the statutory requirements are met); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) . . . [EPA] must approve the program."); *Save the Bay*, 556 F.2d at 1285 ("Unless the Administrator of EPA determines that the proposed state program does not meet these requirements, he must approve the proposal.").

In this case, the court of appeals recognized that "the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species." Pet. App. 53. As a matter of statutory construction, that conclusion should have been controlling. *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

B. The Court of Appeals' Holding Violates the Canons of Statutory Construction and Results in the Implied Repeal of Section 402(b) of the Clean Water Act.

Instead of following the plain language of CWA Section 402(b), the court of appeals concluded that EPA must address "whatever harm may flow from the loss of section 7 consultation" (Pet. App. 47), and cannot approve Arizona's program without "sufficient substitutes for section 7's consultation and mitigation mandates" (*id.* at 52). The court therefore added a tenth criterion to CWA Section 402(b), effectively holding that States must adopt and enforce their own version of the ESA to obtain authority to administer the NPDES program. In so holding, the court violated two cardinal rules of statutory construction: (1) specific statutes are not controlled by general statutes; and (2) repeals by implication are strongly disfavored.

"It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); see also *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

In the CWA, "Congress struck a careful balance among competing policies and interests," and "protected certain sovereign interests of the States." *Arkansas v. Oklahoma*, 503 U.S. 91, 106-07 (1992). Congress did so, in part, through Section 402, which not only created the NPDES program, but requires EPA to approve State NPDES programs satisfying detailed criteria, imposes a strict deadline for State program approval, and establishes

specific post-approval oversight requirements. 33 U.S.C. § 1342(b)-(f). By contrast, the ESA addresses the general objective of protecting listed species and habitat critical to their survival. There is nc evidence that Congress intended to upset the Federal-State balance struck in the CWA or modify the detailed program criteria, the deadline for EPA decisions and other specific requirements imposed under CWA Section 402 when it enacted the ESA. See *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788-91 (1976) (reversing the court of appeals' determination that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, applies to approval of registration statements under the Interstate Land Sales Disclosure Act).

Moreover, "repeals by implication are not favored." *Morton*, 417 U.S. at 549-550 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)); see also Norman J. Singer, 1A *Sutherland Statutory Construction* § 22:13 (6th ed. 2007) (principles of implied repeal apply to implied amendment). "The intention of the legislature to repeal must be 'clear and manifest.'" *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton*, 417 U.S. at 550; see also *United States v. Fausto*, 484 U.S. 439, 452-53 (1988). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551.

There is no affirmative showing of Congressional intent to override the plain and specific language of CWA

Section 402(b). Thus, the only possible basis for an implied repeal is that the statutes are irreconcilable. Any conceivable conflict, however, was eliminated by the Services' 1986 rulemaking, discussed below, interpreting the phrase "actions authorized, funded, or carried out" by Federal agencies as being limited "to all actions in which there is discretionary federal involvement or control." 50 C.F.R. § 402.03. Therefore, the plain language of CWA Section 402(b) is controlling.

II. THE COURT OF APPEALS FAILED TO DEFER TO THE SERVICES' LONG-STANDING INTERPRETATION OF SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT.

More than 20 years ago, the Services promulgated regulations interpreting and implementing ESA Section 7, including 50 C.F.R. § 402.03, governing the applicability of Section 7(a)(2) to Federal agency actions. The court of appeals disregarded that regulation, variously describing 50 C.F.R. § 402.03 as a "gloss" on, and as being "congruent" and "coterminous with" the statutory phrase "authorized, funded, or carried out." The court instead substituted its own view of how the statute should be read. Pet. App. 39-42. This violated settled law:

> [A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. . . . If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

National Cable & Telecomm. Ass'n v. Brand X Internet Services, 545 U.S. 967, 980 (2005) (following *Chevron*, 467 U.S. at 843-44 & n.11, 865-66). This Court previously recognized that "[w]hen it enacted the ESA, Congress delegated broad administrative and interpretative power to the Secretary." *Babbitt v. Sweet Home Ch. of Communities for a Great Ore.*, 515 U.S. 687, 708 (1995) (upholding FWS's regulation defining "harm"). The court of appeals ignored *Chevron* and *Sweet Home,* and erroneously afforded no deference to the agencies' interpretation of Section 7(a)(2).

The Services' current rules have their genesis in the original version of Section 7, which consisted of a two-sentence paragraph and contained a number of undefined terms and no description of the consultation process. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892. The following year, the Services began providing guidance to other Federal agencies and, in early 1976, issued guidelines governing Section 7. See *Interagency Cooperation Regulations; Final Rule*, 43 Fed.Reg. 870 (Jan. 4, 1978). The Services' guidelines were revised and, after notice-and-comment rulemaking, were issued as formal regulations in 1978 and codified in 50 C.F.R. pt. 402. *Id.* at 873-76.

The ESA was subsequently amended by Congress, and Section 7 was divided into subsections and expanded.[14] Nevertheless, certain key terms (including, for example, "jeopardize" and "destruction or adverse modification")

[14] See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751; Endangered Species Act Amendments of 1979, Pub. L. No. 96-159, 93 Stat. 1225; Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411. The legislative history shows that Congress was aware that the Services had promulgated regulations implementing Section 7 and creating the consultation process. See H.R. Rep. 95-1625, at 12 (1978) (Pet. App. 491-92); H.R. Conf. Rep. No. 95-1804, at 18 (1978) (Pet. App. 486-87).

were left undefined, and aspects of the consultation process remained unclear. Consequently, in 1986, the Services promulgated new regulations governing Section 7 implementing the amendments. *Interagency Cooperation Regulations; Final Rule*, 51 Fed.Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. pt. 402) (Pet. App. 318-480). The Services' regulations fill in definitional and interpretive gaps in the statute and provide a uniform process for Section 7 consultation.

In their 1986 rulemaking, which began in 1983 and involved public notice and comment, the Services expressly recognized that an agency's obligations under Section 7(a)(2) are limited by its existing legal authority. See, *e.g.*, *id.* at 19,937 ("a Federal agency's responsibility under section 7(a)(2) permeates the full range of discretionary authority held by that agency") (Pet. App. 365). In addition to 50 C.F.R. § 402.03, other regulations recognize that a federal agency's duties under Section 7(a)(2) are limited by its existing authorities. 50 C.F.R. § 402.16 requires the re-initiation of consultation "where discretionary Federal involvement or control over the action has been retained." Similarly, 50 C.F.R. §§ 402.02 and 402.14(g)(8) require that reasonable and prudent alternatives suggested by the Services to avoid jeopardy be "consistent with the scope of the Federal agency's legal authority and jurisdiction."[15]

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[15] In the preamble, the Services, discussing the regulatory definition of "reasonable and prudent alternatives," acknowledged that they "should be mindful of the limits of a Federal agency's jurisdiction and authority when prescribing a reasonable and prudent alternative. An alternative, to be reasonable and prudent, should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction." *Interagency Cooperation Regulations*, 51 Fed.Reg. at 19,937 (Pet. App. 365). Under the court of appeals' interpretation of ESA Section 7(a)(2), however, an alternative is always within the agency's legal

(Continued on following page)

The Services' interpretation of the applicability of Section 7(a)(2) is consistent with judicial interpretations of the statute. Prior to the completion of the Services' 1986 rulemaking, the Tenth Circuit stated:

> The [ESA] does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the [CWA]. . . . The question in this case is how broadly the Corps is authorized to look under the [CWA] in determining the environmental impact of the discharge [of pollutants] that it is authorizing.

Riverside Irr. Dist. v. Andrews, 758 F.2d 508, 512 (10th Cir. 1985); see also *In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 630 (8th Cir. 2005) ("the ESA does not apply where an agency has no statutory authority to act with discretion"); *AFPA*, 137 F.3d at 299 (Section 7(a)(2) directs "agencies to channel their *existing* authority in a particular manner" (emphasis in original)); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (Section 7 "directs agencies to 'utilize their authorities' to carry out the ESA's objectives" and does not allow agencies to exceed their statutory authority).

The court of appeals, in contrast, interpreted Section 7(a)(2) as applying whenever an agency exercises any "decisionmaking authority," regardless of the constraints on that authority. Pet. App. 42-44. The court further determined that an inter-circuit conflict already existed regarding the applicability of Section 7(a)(2) to non-discretionary actions. *Id.* at 44-47. Conflicting judicial interpretations of statutory terms demonstrate the existence of ambiguity. See *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996).

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authority and jurisdiction because Section 7(a)(2) independently grants authority to agencies.

The Services' regulatory interpretation of the applicability of Section 7(a)(2) to Federal actions appropriately harmonizes the obligations imposed by Section 7(a)(2) with EPA's obligations under CWA Section 402, and prevents the imposition of conflicting statutory duties. Consequently, 50 C.F.R. § 402.03 is entitled to deference under *Chevron*. See, *e.g.*, *Brand X*, 545 U.S. at 980; *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (A reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable"). "When Congress has entrusted the Secretary [of the Interior] with broad discretion, we are especially reluctant to substitute our views of wise policy for his." *Sweet Home*, 515 U.S. at 708. The court of appeals erred by dismissing 50 C.F.R. § 402.03 because it "is a regulation, *not* a statute." Pet. App. 43 n.19 (emphasis in original).[16]

[16] The court of appeals also suggested that 50 C.F.R. § 402.03 was not relevant to its analysis because EPA: (1) elected to initiate consultation with FWS; and (2) refused to take a position below on whether it was required to consult. Pet. App. 43 n.19. But EPA never formally determined that its action was subject to Section 7(a)(2), *i.e.*, that EPA could disapprove Arizona's NPDES program despite finding that the program satisfied the CWA's criteria. Moreover, EPA's reluctance to take a position did not prevent the State of Arizona and Home Builders from arguing, as they did, that the applicability of Section 7(a)(2) is governed by 50 C.F.R. § 402.03. As the dissenting judges recognized, this is a legal issue involving the interpretation of statutes and agency regulations. See Pet. App. 64-67 & n.1; *id.* at 142 ns.1 & 2.

III. SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT DOES NOT GRANT FEDERAL AGENCIES INDEPENDENT AUTHORITY TO ACT FOR THE BENEFIT OF LISTED SPECIES.

Rather than following the plain language of CWA Section 402(b), the court of appeals reinterpreted Section 7, holding that Section 7 grants additional power to Federal agencies to act for the benefit of listed species, and creates an affirmative obligation to exercise that power whenever a Federal agency authorizes, funds or carries out an activity. See, *e.g.*, Pet. App. 30-44. The court of appeals thus held that Section 7 augments EPA's authority, allowing EPA, in issuing an NPDES permit, to control how private land is used and how State water rights are exercised. Yet Congress limited EPA's authority to regulating discharges of pollutants into the navigable waters and, further, expressly recognized and preserved the rights of each State to "plan the development and use . . . of land and water resources" and to "allocate quantities of water within its jurisdiction" (33 U.S.C. § 1251(b) & (g)). No court has previously interpreted Section 7(a)(2) in this manner. As shown below, the court of appeals' expansive reading of ESA Section 7 is not supported by *TVA v. Hill* or by the Act's the legislative history.

A. The Language of the Endangered Species Act of 1973 Does Not Support the Court of Appeals' Interpretation of Section 7(a)(2).

Section 7, as enacted in 1973, consisted of a single paragraph and provided:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the

> Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of [listed species] and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such [listed species] or result in the destruction or modification of [critical] habitat.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 892. Thus, as originally enacted, Section 7 imposed two obligations on federal agencies: (1) to carry out programs for the conservation of listed species; and (2) to ensure that actions they authorize, fund, or carry out do not jeopardize the continued existence of listed species or destroy critical habitat. Both obligations were qualified by the phrase "utilize their authorities." *Ibid.* This version of Section 7 was applied by the Court in *TVA v. Hill*.

This statute (as well as the 1973 Act generally) significantly increased Federal protection for wildlife. The Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973), for example, contained language similar to Section 7, but the obligations of Federal agencies were vague and heavily qualified. The Secretary of the Interior was required to review and utilize other programs administered by him in furtherance of the Act "to the extent practicable." *Id.* at § 2(d), 80 Stat. 927. The Secretary was also required to "encourage" other Federal agencies to "utilize, where practicable, their authorities in furtherance of the purposes of this Act" and to "consult with and assist such agencies in carrying out [the] endangered species program." *Ibid.* Federal agencies were required to "seek to" protect wildlife species and to preserve the habitat of such species "on lands under their jurisdiction," but only "insofar as is practicable and consistent with [their] primary purposes." *Id.* at § 1(b), 80 Stat. 926; see also *TVA v. Hill*, 437 U.S. at 174-76 (discussing prior legislation).

As this Court indicated in *TVA v. Hill*, 437 U.S. at 174, the 1973 Act and its legislative history must be read against this backdrop. Thus, for example, Representative Dingell explained, "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps *within their power* to carry out the purposes of this act." 437 U.S. at 183 (emphasis supplied). There is nothing in the 1973 legislative history indicating that Congress intended, in enacting Section 7, to grant additional authority to Federal agencies or to override non-discretionary mandates in other statutes. And, as explained below, *TVA v. Hill* does not support a contrary interpretation.

B. *TVA v. Hill* Does Not Support the Court of Appeals' Interpretation of Section 7(a)(2).

The panel majority's principal authority for its interpretation of Section 7(a)(2) was *TVA v. Hill*. Pet. App. 32-38. In that case, the Court did not consider whether Section 7 grants additional authority to agencies. Instead, the Court addressed two questions: (1) whether the ESA requires a court to enjoin the operation of a virtually completed Federal dam – a *discretionary* public works project – where the Interior Secretary had "determined that operation of the dam would eradicate an endangered species"; and (2) whether continued appropriations for the project constituted an implied repeal of the ESA. *TVA v. Hill*, 437 U.S. at 156. No dispute existed that the dam's operation would not only violate the ESA, but would directly cause the extirpation of a listed species. *Id.* at 171 ("We begin with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat."). Consequently, the Court held, based on those facts, that Congress had foreclosed the

exercise of equitable discretion and affirmed the court of appeals' injunction preventing operation of the dam. *Id.* at 193-96.

On the second question, the Court held that a line item in an appropriations act failed to evidence a clear and manifest intent by Congress to override the ESA, relying on the rule that repeals by implication are disfavored. *Id.* at 189-93. The Court explained that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress," and that "there is no indication that Congress as a whole was aware of TVA's position." *Id.* at 191-92. The Court also explained that until 1978, the Appropriations Committee was unaware of the possible applicability of Section 7 to the project, and that funds had been appropriated to allow the snail darter to be transplanted, potentially avoiding any conflict. *Id.* at 192-93. The Court's analysis did not address the obligation of a Federal agency faced with a non-discretionary statutory mandate.

In short, the Court did not hold that ESA Section 7 granted additional powers to federal agencies, nor did the Court need to do so given the questions presented and the indisputable violation of the statute's prohibition against jeopardizing listed species. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-17 (1982) (discussing and distinguishing *TVA v. Hill* in the context of an alleged CWA violation). The excerpts of legislative history discussed by the Court, while showing that Congress intended to strengthen the protections afforded listed species relative to the ESA's predecessor statutes, do not demonstrate that Congress intended to grant agencies independent authority to act for the benefit of listed species.

C. The 1978 and 1979 Amendments to the Endangered Species Act Did Not Expand the Scope and Applicability of Section 7(a)(2).

The court of appeals also relied on the 1978 and 1979 ESA amendments, which divided Section 7 into subsections and added the Endangered Species Committee exemption process, as evidencing Congress' intent to grant additional power to agencies. Pet. App. 34-38. Again, the court simply read too much into these amendments, which did not alter the obligations of Federal agencies.

The court cited the different language found in ESA Sections 7(a)(2) and 7(a)(1) as supporting its statutory interpretation. *Id.* at 34. Section 7(a)(1), 16 U.S.C. § 1536(a)(1), directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of species." Since Section 7(a)(1) refers to agencies' "authorities" while Section 7(a)(2) does not, the court concluded Congress intended to grant additional authority to federal agencies in Section 7(a)(2). *Id.* at 34-35. This conclusion was erroneous for several reasons.

Section 2(c) of the original statute (which survives in the current Act) declares Congress' policy that all federal agencies "shall seek to conserve . . . species and *shall use their authorities* in furtherance of this chapter." Endangered Species Act of 1973, Pub. L. No. 93-205, § 2(c), 87 Stat. 885 (currently at 16 U.S.C. § 1531(c)(1)) (emphasis supplied). As shown above, Section 7, as originally enacted, contained the same qualifying language. *Id.* at § 7, 87 Stat. 892. The court of appeals cited a 1973 committee report to show that Section 7 contained two distinct obligations, which later became separate subsections. Pet. App. 34-35. But that report simply paraphrased without explanation the language in

the original version of Section 7. See H.R. Rep. No. 93-412, at 14 (1973). The same report also explained, in discussing the purpose of the ESA, that "the bill declares a policy that Federal agencies are to *use the authorities that are available to them* in carrying out the objectives of this bill." *Id.* at 6 (emphasis supplied); see also *id.* at 10 (discussing ESA Section 2(c)).

Moreover, Congress explained that its amendments to Section 7 merely restated "existing law":

> The conferees adopted Senate language creating a new Section 7(a), *which essentially restates section 7 of existing law*, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision *by retaining existing law*, was preferable since regulations governing section 7 are now familiar to most Federal agencies . . . .

H.R. Conf. Rep. No. 95-1804, at 18 (emphasis supplied) (Pet. App. 487); see also Pet. App. 36 ("The 1978 amendment did not change section 7's substantive provisions."). Under "existing law," an agency's obligation under Section 7 is limited by its authorities.

The court of appeals also failed to consider that Sections 7(a)(1) and 7(a)(2) have different language because those provisions impose different requirements, neither of which grants Federal agencies additional legal authority. Section 7(a)(1) *affirmatively directs* all Federal agencies to act for the benefit of listed species, but limits that obligation to actions within each agency's existing authority under its governing statutes. Section 7(a)(2), in contrast, *prohibits* agencies from jeopardizing listing species or destroying their critical habitat when "authorizi[ng], fund[ing] or carr[ying] out" an action, which necessarily means that agency is acting (or proposing to act) within the scope of its authority under its

governing statutes. In other words, the limitation in Section 7(a)(1) would be redundant in Section 7(a)(2) because an agency does not authorize, fund or carry out an activity without being authorized to do so in the first place. Nothing in Section 7(a)(2) suggests that Congress intended to authorize Federal agencies to ignore non-discretionary mandates imposed by other statutes.[17]

The court of appeals also claimed support for its interpretation of Section 7 from ESA Sections 7(g) and (h), 16 U.S.C. § 1536(g) & (h), which were enacted in the wake of *TVA v. Hill* and created a process under which projects can be exempted from Section 7(a)(2). Pet. App. 36-37. The exemption process, however, deals with irreconcilable conflicts presented *after the consultation has concluded*, when, as in *TVA v. Hill*, a discretionary Federal action would jeopardize a listed species. See, *e.g.*, H.R Conf. Rep. No. 96-697, at 14 (1979) ("The exemption process was designed to resolve endangered species conflicts after other administrative remedies, including consultation have been exhausted. It makes no sense to initiate an exemption process before it has been determined that there is a need for an exemption in the first place.") (Pet. App. 514-15). The enactment of the exemption process is irrelevant to whether Section 7(a)(2) applies to EPA's approval of State NPDES programs and other non-discretionary actions.

In sum, there is simply nothing that supports the court of appeals' interpretation of Section 7(a)(2). While

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[17] In the 1978 amendments, Congress separated the second sentence of Section 7 into two sentences and eliminated the phrase "by taking action necessary" from the statute. Compare Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 892, with Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3752. This amendment also indicates that Section 7(a)(2) is intended to prohibit Federal agencies from jeopardizing listed species when acting pursuant to their existing authorities, rather than requiring agencies to take affirmative action to benefit species.

Congress strengthened the protection afforded species of fish and wildlife when it enacted the ESA in 1973, Congress did not enact a law that generally requires Federal agencies to violate their governing statutes whenever they authorize, fund or carry out an activity. This Court did not interpret Section 7 in this manner in *TVA v. Hill*, and the legislative history does not support such an illogical result.

IV. EPA'S APPROVAL OF ARIZONA'S NPDES PROGRAM WAS NOT THE LEGALLY RELEVANT CAUSE OF FUTURE IMPACTS TO LISTED SPECIES RESULTING FROM PRIVATE LAND USES.

In *Public Citizen*, this Court addressed the obligations of federal agencies under NEPA, an analogous environmental statute. NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It applies to Federal actions "to the fullest extent possible," 42 U.S.C. § 4332, and "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Baltimore Gas & Electric Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

The central issue in *Public Citizen* was the scope of analysis required under NEPA. The Court explained that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," not simply an attenuated "but for" causal relationship. 541 U.S. at 767 (following *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). Thus, the Federal Motor Carrier Safety Administration (FMCSA), in adopting regulations imposing inspection and safety requirements on Mexican-domiciled motor carriers operating in the United States, was required to evaluate

only those environmental impacts resulting from activities that Congress authorized the agency to regulate. *Id.* at 768-69. The Court concluded:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its [environmental assessment] when determining whether its action is a "major Federal action."

Id. at 770.

In this case, the court of appeals, noting the similarity between the regulations defining the effects of an agency's action under NEPA and the ESA, adopted the Court's *Public Citizen* standard for determining whether a proposed action is the legally relevant cause of adverse effects to listed species under Section 7(a)(2). Pet. App. 29-30. The court of appeals explained that a causal relationship must exist between the proposed action and impacts on listed species, and that such a relationship depends on the agency's legal authority. *Id.* at 29 ("a negative impact on listed species is the likely direct or indirect effect of an agency's action *only if the agency has some control over that result*" (emphasis supplied)). The court nevertheless held, purporting to apply *Public Citizen*, that EPA's approval of Arizona's NPDES program "will cause whatever harm may flow from the loss of section 7 conservation benefits" on future projects requiring an NPDES permit to discharge pollutants, and this "harm" is an "indirect effect" of EPA's action. See *id.* at 47-48.

"Indirect effects" are "caused by the proposed action, are later in time, but are still reasonably certain to occur." 50 C.F.R. § 402.02 (definition of "effects of the action"). Indirect effects "include the effects on listed species and

critical habitat of future activities that are induced by the action subject to consultation and that occur after the action is completed." *Interagency Cooperation Regulations*, 51 Fed.Reg. at 19,932 (Pet. App. 344). Real estate development is not induced by a change in the permit-issuing authority. As FWS explained in the biological opinion, "[d]evelopments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability. Based upon the best available information, development in the action area will not be caused by EPA's proposed approval." Pet. App. 113.[18] The majority summarily rejected this reasoning as "implausible," concluding instead that future real estate development and CWA permits are links in the same "'but for' causal chain." *Id.* at 27-28. If this strained reasoning were applied to FMCSA's rulemaking in *Public Citizen*, the President's decision to lift the moratorium and the agency's promulgation of safety rules for Mexican motor carriers would likewise constitute "but for" links in the same causal chain. FMCSA thus would have been required to extend the scope of its NEPA analysis to impacts over which the agency had no control – a result this Court expressly rejected.[19]

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[18] FWS employees initially were confused about what type of causal relationship is needed for an impact to be considered an "indirect effect" under the Services' definition. See J.A. 328-30. As one FWS employee complained, "there is a basic lack of understanding throughout the Service as to what indirect effects are." *Id.* at 329.

[19] The court of appeals cited as authority for this point *Olympic Airways v. Husain*, 540 U.S. 644 (2004), which dealt with the interpretation of the term "accident" in the context of Article 14 of the Warsaw Convention. In *Public Citizen*, in contrast, this Court analogized NEPA's causation requirement to the tort concept of proximate cause. *Public Citizen*, 541 U.S. at 767 (following *Metropolitan Edison*, 460 U.S. at 774 & n.7).

The court of appeals' causation construct was based on its erroneous belief that EPA, when issuing CWA permits, has the authority to control how private land is used. In rejecting Home Builders' argument on this point, the court stated that NPDES permits "relate to the construction itself, not to a discrete discharge during construction." *Id.* at 49 n.22. No authority was cited for this statement, and it cannot be reconciled with the CWA's basic framework, which recognizes the paramount right of states to regulate land uses. 33 U.S.C. § 1251(b); see also *SWANCC*, 531 U.S. at 174. The NPDES program authorizes EPA (or a State with an approved program) to regulate discharges of pollutants from point sources, but does *not* authorize EPA to regulate the activity from which the discharge results. For example, in striking down EPA regulations authorizing the imposition of non-water quality related conditions in NPDES permits, the District of Columbia Circuit explained that "EPA's jurisdiction under the [CWA] is limited to regulating the discharge of pollutants. Thus, just as EPA lacks authority to ban construction of new sources pending permit issuance, so the agency is powerless to impose permit conditions unrelated to the discharge itself." *NRDC II*, 859 F.2d at 170. For the same reason, that court held in *NRDC I* that EPA lacks authority to impose a ban on the construction of a new facility that, when operating, will require an NPDES permit to discharge pollutants. 822 F.2d at 127-31. In short, "the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (emphasis in original); accord *United States v. Mango*, 199 F.3d 85, 93 & n.7 (2d Cir. 1999) (conditions imposed in permits issued under CWA Section 404, 33 U.S.C. § 1344, must be related to the discharge).

The court of appeals also justified its causation analysis by contending that home building and other private land uses are "activities that are interrelated or interdependent with [the Federal] action," *i.e.*, the issuance of NPDES permits. Pet. App. 50 (citing 50 C.F.R. § 402.02 (definition of "effects of the action")). The court, however, ignored the remainder of this definition, which provides: "Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." 50 C.F.R. § 402.02. A real estate development, obviously, does not depend on a NPDES permit for its justification and has utility separate and apart from the permit – the purpose of the development is to build and sell homes, not discharge pollutants.

Consequently, when EPA consults with FWS under ESA Section 7(a)(2) in connection with issuing an NPDES permit, the consultation must be limited to effects on the water body receiving the discharge and the waters downstream thereof (*i.e.*, the "action area"). See 50 C.F.R. § 402.02 (defining "action area"); *Riverside Irr. Dist.*, 758 F.2d at 512 (the relevant "action area" relating to a CWA permit for the construction of a dam included downstream aquatic habitat). Real estate development and other private land uses are not an "effect" of the action because private land uses are not *caused* by the issuance of a NPDES permit. Thus, under *Public Citizen*'s causation analysis, EPA is not required by Section 7(a)(2) to ensure that future land uses do not jeopardize listed species or adversely modify their critical habitat. See 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.01, 402.03.

V. REMAND TO EPA WOULD NOT BE APPROPRIATE BECAUSE EPA COMPLIED WITH THE CLEAN WATER ACT AND THE ISSUES BEFORE THE COURT CONCERN THE INTERPRETATION OF STATUTORY PROVISIONS.

The court of appeals' determination that EPA took contradictory positions regarding its obligations under Section 7(a)(2) (see Pet. App. 23-28) was misplaced and, in any event, does not support a remand to EPA under the current posture of the case.

The court of appeals stated that EPA determined that it was required to consult with FWS but was "not permitted, as a matter of law, to take into account the impact on listed species" in acting on Arizona's NPDES program submission under CWA Section 402(b). Pet. App. 26-27. The court concluded that because both requirements cannot be correct, EPA's ultimate decision, *i.e.*, approval of Arizona's NPDES program, "was not the result of reasoned decisionmaking." *Id.* at 27.[20] This reasoning was superficial and conflicts with the record, which shows that EPA's position on its CWA authority was consistent, not arbitrary and capricious.

EPA consistently maintained that approval of Arizona's NPDES program under CWA Section 402(b) merely constituted a shift in administrative responsibility for issuing and enforcing permits under the NPDES program. See *id.* at 114, 564, 615. EPA also maintained it lacked authority

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[20] The court of appeals also concluded that EPA's (and FWS's) position, that future impacts on listed species resulting from private land use are not caused by the approval of Arizona's program, was implausible. Pet. App. 27-28. As discussed in part IV, *supra*, the court's conclusion was the result of erroneously applying *Public Citizen* and incorrectly assuming that EPA regulates upland land uses when issuing CWA permits, rather than discharges of pollutants into navigable waters.

under the CWA to regulate non-water-quality-related impacts resulting from private land use activities. See, *e.g.*, *id.* at 114, 564-65. EPA's position was consistent with the two prior consultations between EPA and the Services, which were also limited to species affected by surface water quality. *Approval of Application by Maine*, 66 Fed.Reg. at 12,793-94; *Approval of Application by Texas*, 63 Fed.Reg. at 51,201. Moreover, the local FWS employees agreed that approval of Arizona's NPDES program would have no adverse water quality-related impacts on listed species or critical habitat. See, *e.g.*, Pet. App. 563. At that point, the consultation should have concluded informally, without a biological opinion. See 50 C.F.R. §§ 402.13, 402.14(b)(1).

Instead, local FWS employees quarreled with EPA's interpretation of EPA's legal authority under the CWA, and contended "all the effects" of EPA's action must be evaluated "regardless of whether [EPA] could do anything about those effects," notwithstanding FWS's own confusion over what constitutes an "indirect effect." J.A. 121, 328-30. This dispute was elevated to the agencies' headquarters (*id.* at 123), and FWS issued a biological opinion containing the reasoning characterized as contradictory by the court. That reasoning, however, was premised on the plain language of CWA Section 402(b), which required EPA to approve Arizona's NPDES program if the nine statutory criteria are satisfied, and EPA's authority to regulate discharges of pollutants – not private land use activities.

The court of appeals acknowledged that EPA had "complied with its obligations under the [CWA]" (Pet. App. 47), and therefore its decision was neither arbitrary nor capricious. The court instead concluded that EPA mistakenly relied on FWS's biological opinion, which "was flawed in its basic legal premise." *Id.* at 48. The court of appeals' "legal premise" was that Section 7(a)(2) grants additional authority to Federal agencies and that this

authority overrides all non-discretionary mandates imposed by the CWA. Whether the court of appeals' interpretation of these statutes was correct is a legal question that this Court should decide. See 5 U.S.C. § 706 ("when presented, the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions"); see also Pet. App. 64-66 & n.1 (Thompson, J., dissenting); *id.* at 142 ns.1 & 2 (Kozinski, J., dissenting from denial of rehearing).

Remand to the agency is normally required "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it . . . . " *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Thus, remand is appropriate when additional factual development or clarification is required. See, *e.g.*, *Gonzalez v. Thomas*, ___ U.S. ___, 126 S.Ct. 1613, 1615 (2006) (remanding the case to the agency because "[t]he matter required determining the facts and deciding whether the facts as found fall within a statutory term"); *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (same). Here, in contrast, the questions before the Court turn on the interpretation of the CWA and the ESA (and those statutes' implementing regulations), which does not require further development of a factual record.

As Home Builders and the State of Arizona argued below, EPA was not required to consult with FWS prior to approving Arizona's NPDES program: EPA has no discretion to act for the benefit of listed species when approving State programs under CWA Section 402(b), and the Services' regulation, 50 C.F.R. § 402.03, should have been controlling. To the extent that the positions of EPA and the Services on the applicability of Section 7(a)(2) to State NPDES program approvals under CWA Section

402(b) require clarification, the agencies now have authoritatively spoken on this issue and have determined Section 7(a)(2) does not apply in this context. See EPA Pet. App. 93a-102a (App. C), 103a-110a (App. D), 111a-116a (App. E). "[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by ambiguities of a statute with the implementing agency.'" *Brand X*, 545 U.S. at 981 (quoting *Smiley*, 517 U.S. at 742). Remand under these circumstances would add nothing to the record and, instead, would delay resolution of the significant legal questions presented in this case.

CONCLUSION

For the foregoing reasons, the decision by the United States Court of Appeals for the Ninth Circuit should be vacated.

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Respectfully submitted,

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STATUTES

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or

abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

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33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements

of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be

subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and

guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS. – A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and

provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves

that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * *

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16 U.S.C. § 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that –

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve

to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to –

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as

may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

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16 U.S.C. § 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result

in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A) –

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth –

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section,

the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that –

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that –

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of

identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

REGULATIONS

40 C.F.R. § 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System – NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made

with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the

State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

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40 C.F.R. § 123.21 Elements of a program submission.

(a) Any State that seeks to administer a program under this part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State (or in the case of an Indian Tribe in accordance with § 123.33(b), the Tribal authority exercising powers substantially similar to those of a State Governor) requesting program approval;

(2) A complete program description, as required by § 123.22, describing how the State intends to carry out its responsibilities under this part;

(3) An Attorney General's statement as required by § 123.23;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.24;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(b)(1) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program under CWA) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(2) In the case of an Indian Tribe eligible under § 123.33(b), EPA shall take into consideration the contents of the Tribe's request submitted under § 123.32, in determining if the program submission required by § 123.21(a) is complete.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

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40 C.F.R. § 123.61 Approval process.

(a) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the FEDERAL REGISTER, and in enough of the largest newspapers in the State to attract statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State and EPA mailing lists and all

permit holders and applicants within the State. The notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the FEDERAL REGISTER;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(b) Within 90 days of the receipt of a complete program submission under § 123.21 the Administrator shall approve or disapprove the program based on the requirements of this part and of CWA and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments.

(c) If the Administrator approves the State's program he or she shall notify the State and publish notice in the

FEDERAL REGISTER. The Regional Administrator shall suspend the issuance of permits by EPA as of the date of program approval.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

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50 C.F.R. § 402.01 Scope.

(a) This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended ("Act"). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants ("listed species") and habitat of such species that has been designated as critical ("critical habitat"). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act

authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)-(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share

responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

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50 C.F.R. § 402.02 Definitions.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in

process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11-17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which

is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

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50 C.F.R. § 402.03 Applicability.

Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

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50 C.F.R. § 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the

requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal

consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that

to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraph (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot

alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may

proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

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50 C.F.R. § 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

LEGISLATIVE HISTORY

Endangered Species Act of 1973, Pub. L. No. 93-205, Section 2, 87 Stat. 884, 885 (1973)

Sec. 2. (a) FINDINGS. – The Congress finds and declares that –

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to –

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements.

(5) encouraging the State and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife.

(b) PURPOSES. – The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) POLICY. – It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

Endangered Species Act of 1973, Pub. L. No. 93-205, Section 7, 87 Stat. 884, 892 (1973)

INTERAGENCY COOPERATION

SEC. 7. The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

226a

Nos. 06-340 & 06-549

Supreme Court, U.S.
FILED
FEB 20 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPENING BRIEF OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

1. Whether Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of any endangered or threatened species or modify its critical habitat, impliedly repealed the Environmental Protection Agency's obligation to transfer its pollution permitting authority to Arizona under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b).

2. Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer permitting authority to Arizona under the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2).

PARTIES TO THE PROCEEDING

The State of Arizona filed a brief in support of the petition for writ of certiorari and was an intervenor in the court of appeals.

The United States Environmental Protection Agency (EPA) is a Petitioner in this Court and was a respondent in the court of appeals. The National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association (collectively referred to as Home Builders or NAHB) are also Petitioners in this Court and were intervenors in the court of appeals.

The following parties are Respondents in this Court and were petitioners in the court of appeals: Defenders of Wildlife, Center for Biological Diversity, and Craig Miller.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 420 F.3d 946 (9th Cir. 2005), and is reprinted at Petitioners National Association of Home Builders' Appendix (NAHB Pet. App.) at 1-68. The denial of rehearing en banc and Judge Kozinski's dissent from that denial, which was joined by Judges O'Scannlain, Kleinfeld, Tallman, Callahan, and Bea, is reported at 450 F.3d 394 (9th Cir. 2006), and is reprinted at NAHB Pet. App. 134-158.

JURISDICTION

Respondents petitioned the United States Court of Appeals for the Ninth Circuit to review EPA's decision to transfer its pollution permitting authority to Arizona under 33 U.S.C. § 1369(b)(1). The court of appeals issued its judgment and opinion on August 22, 2005, and denied rehearing en banc on June 8, 2006. Home Builders filed a Petition for Writ of Certiorari on September 6, 2006. Arizona filed its Brief in Support of Petition for Writ of Certiorari on September 26, 2006. After receiving extensions of time from Justice Kennedy, EPA filed its Petition for Writ of Certiorari on October 23, 2006. The Court granted Home Builders' and EPA's Petitions for Certiorari on January 5, 2007, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7(a)-(b) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)-(b), and Section 402(b) of the Federal Water Pollution Control Act (Clean Water Act or

CWA), 33 U.S.C. § 1342(b), are reproduced in EPA's Pet. App. 117a-124a.

STATEMENT OF THE CASE

This case concerns the State of Arizona's efforts to obtain authority to administer the surface water discharge permitting program, known as the National Pollutant Discharge Elimination System (NPDES), in Arizona under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). The EPA transferred the NPDES program to Arizona after determining that its program met the requirements of the Clean Water Act. Arizona was the forty-fifth State to obtain EPA approval of its permitting program.

Congress clearly intended the States to run the pollution permitting programs upon demonstrating that their programs met the Clean Water Act criteria. And, this Court and others have recognized that approval of the transfer of NPDES authority to a State is mandatory after it demonstrates that it meets the criteria set forth in Section 402(b). There is no dispute that Arizona met the statutory criteria. Nevertheless, a majority of a panel of the Ninth Circuit vacated the transfer of the program to Arizona on the grounds that the EPA, the transferring agency, failed to comply with the requirements of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

In reaching its conclusion, the majority panel determined that the Endangered Species Act repealed the mandating language of Section 402(b) by implication, contrary to this Court's rulings, and misread the legislative history of the Endangered Species Act. The majority's views of the reach of the Endangered Species Act are not

only wrong as a matter of law, but radical in nature, potentially imposing Endangered Species Act Section 7 requirements on every decision of the United States government, even where other acts of Congress have, as here, directed agency decisions under specified circumstances. Because the court of appeals erred on a question of law, Arizona urges the Court to vacate the court of appeals' decision and order it to uphold EPA's administrative decision approving Arizona's program under the Clean Water Act.

A. Statement of Facts.

In 2001, the Arizona Legislature authorized and directed the Arizona Department of Environmental Quality (ADEQ) to establish a state pollution permitting program, known as the Arizona Pollutant Discharge Elimination System (AZPDES), which was to be consistent with the requirements of § 402(b) of the Clean Water Act. 2001 Ariz. Sess. Laws, Ch. 357, § 5 (codified at Arizona Revised Statutes Annotated (A.R.S.) §§ 49-255 to -255.03). Pursuant to this statutory authority, Arizona employees drafted and promulgated the extensive regulations necessary to obtain EPA approval of Arizona's pollution permitting program. *See* Arizona Administrative Code R18-9-A901 though R18-9-1015.

In January, 2002, Arizona applied to EPA for transfer of the NPDES program regarding Arizona waterways (except those on Indian land). (NAHB Pet. App. 7.) EPA consulted with the United States Fish & Wildlife Service (Service) under § 7(a)(2) of the Endangered Species Act concerning the effect of EPA's transfer of the NPDES program and the Service sent EPA its Biological Opinion

on December 3, 2002. (NAHB Pet. App. 77.) The Service concluded that EPA's approval of the AZPDES program was "not likely to jeopardize the continued existence of [listed] species, and is not likely to destroy or adversely modify designated or proposed critical habitat." (NAHB Pet. App. 116.) The Service's conclusion was based in part on its analysis of causation:

> Further, loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

(NAHB Pet. App. 114.)

On December 5, 2002, the EPA approved Arizona's application to administer the NPDES program pursuant to Section 402(b) of the Clean Water Act. (NAHB Pet. App. 69.) Arizona thus became the forty-fifth State to obtain this authority. (NAHB Pet. App. 4.) The EPA found that Arizona had met all the requirements of Section 402(b). (J.A.pp. 237) This finding is not disputed by any party. (Pet. App. 31 n.11.)

Arizona obtained the EPA's approval of its AZPDES program as the result of more than two years of effort. (Ariz. App. 6.)[1] The State invested over one million dollars in resources and staff time in creating the AZPDES

[1] This refers to the Appendix attached to the State of Arizona's Brief in Support of Petition for Writ of Certiorari.

program. (*Id.*) Arizona state employees developed new state laws and rules, prepared the submission of the Arizona program for approval, negotiated and drafted the memoranda of agreement with EPA to implement the program, and drafted the program guidance materials for the regulated community. (*Id.*) Arizona's resource commitment to AZPDES, in terms of money and personnel time, has increased substantially during the pendency of this case.

Invalidation of the AZPDES program would seriously disrupt the pollution permitting process in Arizona. If Arizona's authority to continue its program is vacated, regulated facilities would not know where to send information regarding their permits, how to send it, or what government official to contact regarding permit issues. (Ariz. App. 7.) Action on permit applications would be substantially delayed pending a determination as to what agency would take over their processing. (*Id.* at 8.)

Further, invalidation of the AZPDES program would halt or delay Arizona business activities, including construction projects that are proceeding under general permits that have been issued in the AZPDES program. For example, in 2003 the Arizona Department of Environmental Quality (ADEQ) completed promulgation of the AZPDES Construction General Permit. (*Id.*) As the Ninth Circuit majority noted, ADEQ issues several thousand storm-water-discharge construction permits annually. (Pet. App. 49 n.22.) The EPA revised its National Construction General Permit on July 1, 2003, but it does not cover construction projects in Arizona outside of reservations. 68 Fed. Reg. 39087, 39089 (July 1, 2003). If Arizona's Construction General Permit is invalid, there will be many new construction sites that would otherwise be

covered by the Arizona permit that will no longer be able to legally discharge under any authority. (Ariz. App. 8.)

In addition, invalidation of the AZPDES program may negatively affect Arizona's environment and water quality. (*Id.*) The ADEQ has implemented education and outreach efforts to ensure that the regulated community understands its responsibilities under the Clean Water Act and Arizona law. (*Id.*) Under the AZPDES program, there are more inspections of and other site visits to discharging facilities than there were when EPA was managing the NPDES program in Arizona. (*Id.*) These benefits and increased regulatory oversight would cease if the AZPDES program is invalidated. (*Id.*)

Finally, since approval of AZPDES, ADEQ has provided the United States Fish and Wildlife Service (Service) with significantly increased notice of proposed projects in Arizona that may affect endangered species. (Ariz. App. 2-3.) ADEQ requires every construction general permit applicant to submit a Notice of Intent including a unique geographic identifier. (*Id.* at 3.) The Service has provided ADEQ a geographic information system map that identifies the areas in Arizona that are of critical habitat concern. (*Id.*) ADEQ's "Smart Notice of Intent" computer system matches the identified project area with the established areas of concern provided by the Service. (*Id.*) Upon receiving a general permit Notice of Intent in an area of critical habitat concern, ADEQ informs developers that they are not authorized to discharge for thirty-two business days – thus, preventing the beginning of construction during that time. (*Id.*) ADEQ sends a copy of Notices of Intent that affect critical habitat areas to the Service. (*Id.* at 4.) The Service thus has thirty-two days to assess the impact on endangered species and contact the developer

concerning the impacts. (*Id.*) Under the NPDES program in Arizona, developers could automatically begin construction within forty-eight hours of giving notice. (*Id.* at 3.)[2]

B. Proceedings Below.

In April 2003, Respondents petitioned the court of appeals to review EPA's approval of the AZPDES program under 33 U.S.C. § 1369(b)(1)(D), which allows "any interested person" to request the court of appeals to review EPA's determinations regarding state permitting programs. Respondents contended that EPA's decision to approve AZPDES was arbitrary and capricious because it failed to follow § 7(a)(2) of the Endangered Species Act. (NAHB Pet. App. 13.) Arizona moved to intervene because it had a significant protectable interest in the EPA's approval of the AZPDES program and intended to raise a legal argument that EPA might not raise – that is, that EPA could not deny the transfer based on § 7 of the Endangered Species Act if the transfer met the requirements of § 402(b) of the Clean Water Act. (State of Arizona's Motion to Intervene, May 2, 2003.) The court of appeals allowed Arizona as well as Petitioners Home Builders to intervene. (NAHB Pet. App. 13.)

Respondents also filed a lawsuit against the administrator of the EPA and other federal officers in the United States district court in Arizona alleging, among other

[2] Although the Service opines in its Biological Opinion that Arizona's process will not provide species conservation that is equivalent to that required by § 7 of the Endangered Species Act (NAHB Pet. App. 79), the Service does not address whether EPA received sufficient notice of construction in an area of critical habitat concern to enable it to protect listed species.

claims, that the Biological Opinion that supported EPA's decision to approve AZPDES violated the Endangered Species Act. (*Id.*) The district court ordered that the challenge be severed from Respondents' other claims and transferred to the court of appeals because that court had exclusive jurisdiction over the challenge. (NAHB Pet. App. 13.) The court of appeals consolidated the transferred district court challenge with Respondents' petition for administrative review. (NAHB Pet. App. 13.)

A two-member majority of the court of appeals concluded that EPA's approval of Arizona's transfer application was arbitrary and capricious because it was based on "legally contradictory positions regarding its section 7 obligations" (NAHB Pet. App. 23), and that therefore the transfer decision must be remanded "to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute" (*id.* at 28). The majority then decided the legal question that it had purported to remand to EPA:

> We hold that approving Arizona's pollution permitting transfer application was an agency action "authorized" by the EPA, thus triggering both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. The EPA may have complied with its obligations under the Clean Water Act, but compliance with a "complementary" statute cannot relieve the EPA of its independent obligations under section 7(a)(2). . . . Section 7(a)(2) imposes a duty on the EPA to "insure" its transfer decision is not likely to jeopardize protected species or adversely modify their habitat, and this duty exists alongside Clean Water Act provisions as

> the agency's "first priority." [TVA v.] Hill, 437 U.S. [153,] 185 [(1978)].

(NAHB Pet. App. 47.) The majority then vacated the EPA's decision to approve Arizona's pollution permitting application. (NAHB Pet. App. 63.)

Judge Thompson dissented. (NAHB Pet. App. 64-68.) He would have denied Respondents' petition for review because "EPA's authority to grant or deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary." (*Id.* at 68.) "[T]herefore its decision was not 'agency action' within the meaning of section 7 of the Endangered Species Act." (*Id.* at 66.)

The respondents EPA and the Service and intervenors Arizona and Home Builders moved for rehearing en banc. (NAHB Pet. App. 134). The court denied rehearing en banc. (NAHB Pet. App. 135.) Judge Kozinski dissented from the denial and five judges joined his dissent. (NAHB Pet. App. 135-149.) Judge Kozinski disagreed with the majority's conclusion that EPA's decisionmaking was internally inconsistent and concluded that, even if there was inconsistency, the majority should have remanded to EPA for further clarification. (*Id.* at 138-39.) He also determined that the majority got it "flatly wrong" when it concluded that the Endangered Species Act required EPA to take endangered species into account when making its decision whether to transfer a permitting program under § 402(b) of the Clean Water Act. (*Id.* at 141.) The majority's interpretation "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute," which was contrary to the Service's regulation, 50 C.F.R. § 402.03, and this Court's

decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). (*Id.* at 141-44.)

The court stayed its mandate pending this Court's final disposition. (Court of Appeals Order of June 16, 2006.)

SUMMARY OF ARGUMENT

I. In enacting the Clean Water Act, Congress intended that the States would administer the pollution permitting programs outlined in Section 402(b) of the Act in accordance with Section 402(b) requirements. The language of Section 402(b) is unambiguous: the EPA "shall approve" a State's application to administer the pollution permitting programs unless the applying State does not meet one of the requirements specified therein.

The panel majority erred in determining that Section 7(a)(2) of the Endangered Species Act precluded the EPA from approving Arizona's permitting program even though the program met all the requirements of the Clean Water Act. Because Section 402(b) is mandatory, the majority in effect determined that Congress impliedly repealed a portion of the Clean Water Act. This conclusion is wrong because Congress did not intend to alter Section 402(b) when it enacted the Endangered Species Act, and the two statutes can be easily reconciled.

II. Because EPA was required to approve Arizona's permitting program once it determined that the program met the requirements of the Clean Water Act, the majority should have upheld EPA's approval regardless of any inconsistencies in EPA's interpretation of the Endangered

Species Act. This Court should therefore vacate the court of appeals decision and uphold EPA's decision based on the correct interpretation of Section 7(a)(2) of the Endangered Species Act.

ARGUMENT

I. The EPA's Decision to Transfer Pollution Permitting Authority to Arizona Was Legally Correct.

A. The EPA Must Transfer Permitting Authority to a State Permitting Program that Meets the Requirements of Section 402(b) of the Clean Water Act.

The Ninth Circuit majority opinion ignored both the clear statement of congressional intent in the Clean Water Act, and its plain language, in holding that Section 7 of the Endangered Species Act expanded the requirements that Arizona must meet to receive EPA approval of its NPDES program.

In the Clean Water Act, Congress expressly stated its intent that the respective States be responsible for running the Act's several pollution control programs, including the NPDES program at issue in this case:

> It is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. *It is the policy of Congress that the States manage* the construction

> grant program under this chapter *and implement the permit programs under Sections 1342 and 1344 of this title.*

33 U.S.C. § 1251(b) (NAHB Pet. App. 160) (emphasis added). Under Section 402(b), 33 U.S.C. § 1342(b), the EPA administrator "shall approve" each state application to administer the NPDES program "unless" she determines that the applying State does not meet one of the nine specified requirements set forth therein. (NAHB Pet. App. 165-67.)

This Court has recognized that EPA approval of a state program is mandatory when a State, like Arizona, demonstrates that it has met all nine criteria. *EPA v. Calif. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 208 (1976) ("The EPA may require modification or revision of a submitted program but when a plan is in compliance with the EPA guidelines . . . and is supported by adequate authority to achieve the ends of §§ 402(b)(1)-(9) . . . and to administer the described program, the EPA shall approve the program. . . ."). And, before the majority opinion here, the circuit courts consistently acknowledged that EPA must approve a state program if it meets the requirements of § 402(b). *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of § 402(b) is firm: It provides that EPA "shall" approve submitted programs unless they fail to meet one of the nine listed requirements."); *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 173-174 (D.C. Cir. 1988) (noting that "Congress repeatedly articulated its expectation that the States would play a major role in administering" the NPDES program and finding that it "commands the Administrator to approve the state permit system once he determines that the statutory requirements and administrative guidelines are

met"); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) . . . and the guidelines issued under section 304(i) . . . , the Administrator must approve the program."); *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978) ("Under § 1342(b), a state may submit to the EPA" and "[i]f the state can demonstrate that it will apply the effluent limitations and the amendments' other requirements in the permits it grants and that it will monitor and enforce the terms of those permits," the EPA Administrator "must approve the proposal.").

The majority nevertheless concluded that the EPA has the "authority" and "duty" "to deny a pollution permitting transfer application that meets Clean Water Act standards but would jeopardize protected species." (NAHB Pet. App. 31.) This conclusion is contrary to the mandatory language in § 402(b) and neither the language nor the purpose of the Endangered Species Act gives the EPA the authority to override this mandatory provision of the Clean Water Act.

B. Neither the Language nor the Purpose of the Endangered Species Act Supports the Majority's Apparent Conclusion that the Endangered Species Act Impliedly Repealed Congress's Mandate in Section 402(b) of the Clean Water Act.

Without explicitly acknowledging it, the majority concluded that Congress, in passing the Endangered Species Act, intended to alter the statutory scheme for approving the transfer of NPDES authority to States. Where before a State like Arizona had to satisfy only the nine criteria expressly stated in Section 402(b), the

majority held that Congress added a tenth requirement – compliance with Section 7(a)(2) of the Endangered Species Act. The Ninth Circuit thus held that the ESA repealed, by implication, the provision of the Clean Water Act that the Director of the EPA "shall" approve a state program upon demonstration of its compliance with the Clean Water Act.

This Court has long followed "'the cardinal rule . . . that repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)). "In practical terms, this 'cardinal rule' means that '[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" *TVA v. Hill*, 437 U.S. 153, 190 (1978) (quoting *Mancari*, 417 U.S. at 550). Moreover, "a statute dealing with a narrow, precise, and specific subject is not subsumed by a later enacted statute covering a more generalized spectrum. . . . unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Traynor v. Turnage*, 485 U.S. 535, 547-548 (1988) (internal citations and quotations omitted). "The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings. . . ." *Matsushita Elec. Indus'l Co., Ltd. v. Epstein*, 516 U.S. 367, 381 (1996).

1. Congress did not intend for the Endangered Species Act to modify Section 402(b) of the Clean Water Act.

Congress expressed no intention to alter the Clean Water Act NPDES approval scheme when it enacted the

Endangered Species Act of 1973. Instead, it clearly intended for the requirements of the new Act, including Section 7, to be limited to actions within federal agencies' existing authorities. As originally enacted, Section 7 provided:

> The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphasis added) (NAHB Pet. App. 483).

When Congress amended the Endangered Species Act in 1978, it divided Section 7 into subsections. As amended, subsection 7(a) contained, in two separate sentences, substantially the same language currently found in subsections (a)(1) and (a)(2) of the ESA. *See* Pub L. No. 95-632, § 3, 92 Stat. 3752 (1978). The 1978 amendment did not change Section 7's substantive provisions:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 95-1804 at 18 (NAHB Pet. App. 487). Thus, far from expressing an intent to repeal existing provisions of the Clean Water Act, Congress intended to preserve the substance of § 7's original requirements. Congress again amended subsection 7(a) and separated it into 7(a)(1) and (a)(2) but again expressed no intent to make a substantive change. *See* Pub. L. No. 96-159, § 4, 93 Stat. 1226 (1979).

Despite this legislative history, the panel majority concluded that Congress intended to give federal agencies a substantive grant of authority when it enacted § 7 in 1973 that impliedly repealed EPA's mandatory obligations under the Clean Water Act. (NAHB Pet. App. 38.) In reaching this conclusion, the majority ignored the original language of § 7 of the Endangered Species Act and failed to acknowledge that the phrase "utilize their authorities" clearly applied to the language that is now in § 7(a)(2). The majority then bases its analysis of the meaning of § 7 in 1973 on the wrong language – that is, its analysis is based on the current language of § 7 not the language that was enacted in 1973.

> Another aspect of the statute's structure and history . . . bolsters the conclusion that section 7 includes an affirmative grant of authority to attend to protection of listed species with agencies'

> authority when they take actions covered by section 7(a)(2). Section 7(a)(1) of the Endangered Species Act directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species." 16 U.S.C. § 1536(a)(1). Section 7(a)(2), in contrast, does not refer to agencies' existing "authorities," but instead directs agencies that, when considering covered "actions," they are to proceed in a manner not likely to jeopardize listed species.
>
> The House Report indicates that this distinction between the two sections was, as one would expect, deliberate. The Report noted the requirement of present section 7(a)(2) as imposing a "*further* require[ment]" beyond that of section 7(a)(1). *See* H.R. Rep. No. 93-412, at 14 (1973). . . . (emphasis added). The contrasting language of the two sections indicates that the "further requirement" imposed by section 7(a)(2) turns on the distinction between using *existing* authority to promote conservation of species and conferring an *additional*, do-no-harm obligation – and reciprocal authority – applicable when the agency's *own* actions could cause harm to endangered species.

(NAHB Pet. App. 34-35.)

Of course, the House Report in 1973 did not support the majority's construction of § 7 because the Report commented on the original language in § 7, which required agencies to act within their existing authorities. Similarly, Representative Dingell's comments about the 1973 Act, on which the majority also relied (NAHB Pet. App. 35), are instructive in interpreting the language of § 7 as it was originally enacted but do not support the majority's conclusion that Congress intended agencies to act within their

existing authorities when "carrying out programs for the conservation" of listed species but not when insuring that their actions were not likely to jeopardize listed species.

The majority also relied on this Court's opinion in *TVA v. Hill*, 437 U.S. 153 (1978), to support its expansive interpretation of § 7(a)(2). (NAHB Pet. App. 32-35.) But *Hill* construed the language of § 7 as it was originally enacted in 1973, 473 U.S. at 160, and addresses whether a federal agency must comply with § 7 when it is acting within its existing authority, *id.* at 164 n.14. Therefore, *Hill* does not support the majority's analysis.

In sum, nothing in the language or legislative history of the Endangered Species Act indicates that Congress intended to repeal any portion of § 402(b) of the Clean Water Act. Indeed, the majority acknowledges that Congress chose not to impose the requirements of the Endangered Species Act on the States. *See* NAHB Pet. App. 6 ("By its terms § 7(a)(2) applies only to 'federal agencies' not to state governmental bodies. Accordingly EPA's pollution permitting decisions are subject to section 7(a)(2) but state pollution permitting decisions are not.").[3] Yet under the majority's analysis, Arizona must enact or agree to provisions similar to § 7 of the Endangered Species Act in order to obtain EPA approval of its permitting program.

The majority opinion found that the transfer of the NPDES program to Arizona would harm endangered species because Section 7 consultation would not be

[3] *See also* Brief of Amici Curiae States of Nebraska, et al., in Support of the Petition for Writ of Certiorari at 13 (analyzing the language and legislative history of the Endangered Species Act and concluding that States are encouraged to work cooperatively with the federal government but that such state programs are strictly voluntary).

required when Arizona was running the program. (NAHB Pet. App. 6, 47.) Although Arizona took a number of actions to increase its protection of endangered species, including its innovative "Smart Notice of Intent" program that provides early warning to the State and the Service whenever a development is proposed near critical habitat, the majority opinion makes it clear that Arizona's voluntary efforts did not suffice under Section 7 to allow the program transfer to proceed:

> In the abstract, voluntary compliance by state agencies willing to follow [Fish and Wildlife Service] recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

(NAHB Pet. App. 60.) Thus, the majority indicated that EPA must withhold approval from a State unless it either created a statutory program substantially similar to the Endangered Species Act or agreed to consult with the Fish and Wildlife Service or National Marine Fisheries Service on all state NPDES permitting decisions. That the effect of the majority's opinion is to impose the Endangered Species Act on the States under the guise of Clean Water Act approval further reinforces the conclusion that the majority erred in concluding that Congress impliedly repealed the mandate in § 402(b) of the Clean Water Act.

2. Section 7(a)(2) of the Endangered Species Act can be easily reconciled with Section 402(b) of the Clean Water Act.

If the majority had deferred to the Service's regulation and other federal decisions interpreting § 7(a)(2) to apply only to discretionary agency actions, it could have reconciled § 402(b) with § 7(a)(2). It erred in making no attempt to reconcile the provisions.

In 1986, the agencies responsible for enforcing the Endangered Species Act, the Fish & Wildlife Service and the National Marine Fisheries Service, promulgated a regulation interpreting the scope of § 7's requirements: "Section 7 and the requirements of this Part apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added) (NAHB Pet. App. 230); *see also* 50 C.F.R. § 402.16 (requiring reinitiation of formal consultation "where discretionary Federal involvement or control over the action has been retained") (NAHB Pet. App. 243). Under this regulation, § 7 did not apply to the EPA's approval of Arizona's permitting program because it lacked discretion to withhold its approval after Arizona had met the requirements of § 402(b).

Instead of finding the two statutes reconcilable by deferring to the Service's reasonable interpretation in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the majority interpreted "discretionary" to be somehow consistent with its interpretation of § 7(a)(2) as conferring additional agency authority. (NAHB App. 40-42.) Contrary to the majority's assertion, this interpretation was not consistent with its other decisions interpreting the Endangered Species Act. As Judge Thompson noted in his dissent, the Ninth Circuit has "consistently recognized that an agency

may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered and threatened species." NAHB Pet. App. 64-65 (Thompson, J., dissenting) (citing *Ground Zero Ctr. For Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074-75 (9th Cir. 1996); and *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-10 (9th Cir. 1995)).

The majority could have also reconciled § 7(a)(2) with § 402(b) of the Clean Water Act by adopting other circuits' interpretation of the scope of § 7(a)(2). *See Am. Forest & Paper Ass'n*, 137 F.3d at 297, 299 (finding that the language of § 402(b) is non-discretionary and that § 7(a)(2) is not a "font of new authority" but "a directive to agencies to channel their *existing* authority in a particular direction"); *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 34 (D.C. Cir. 1992) (Section 7 "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.") Instead, the majority rejected the analysis of those decisions, acknowledging that there was an intercircuit conflict on the question. (NAHB Pet. App. 44.)

The majority erred in failing to reconcile § 7(a)(2) with § 402(b) of the Clean Water Act. Because § 7(a)(2) applies only to discretionary agency actions, it did not conflict with EPA's responsibility to approve Arizona's permitting program when it determined that the program met the requirements of § 402(b) of the Clean Water Act. EPA thus correctly approved Arizona's permitting program and this Court should vacate the majority's decision to vacate that approval.

II. Because the EPA Was Required to Approve Arizona's Pollution Permitting Program Under the Clean Water Act, Its Approval Was Legally Correct Regardless of Its Interpretation of Section 7(a)(2) of the Endangered Species Act.

A. The Court of Appeals Should Have Upheld the EPA's Approval Because It Was Legally Correct.

The majority determined that it "must review the EPA's actions based on the 'grounds . . . upon which the record discloses that its action was based.'" (NAHB Pet. App. 25 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The majority then concluded that it must remand to the EPA because EPA's approval of Arizona's pollution permitting program was inconsistent with its original belief that § 7 required consultation. (NAHB Pet. App. 28.) EPA has persuasively demonstrated that its position concerning § 7 consultation was not inconsistent with its decision to rely on the Service's Biological Opinion. *See* EPA's Petition at 23-25. Moreover, the *Chenery* rule does not apply here because Intervenors Arizona and Home Builders correctly argued below that EPA was required to approve Arizona's permitting program under the Clean Water Act. Thus, the court of appeals should have upheld the EPA's approval.

In *Chenery*, the Court held that, when an agency's decision involves an exercise of judgment in an area that Congress has entrusted to the agency, the reviewing court could not uphold the agency's decision based on grounds that were different from those on which the agency relied. 318 U.S. at 94-95. The Court explicitly stated that this principle did not apply when the administrative agency made an erroneous determination of law. *Id.* at 88 ("[W]e

do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.") (internal quotations omitted); *id.* at 94 ("But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.").

The lower courts have consistently held that the rule in *Chenery* does not apply to their review of an agency's interpretation of a federal statute. *See Ry. Executives' Ass'n v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986) ("Generally, a reviewing court may only judge the propriety of an agency decision on the grounds invoked by the agency, . . . the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute."); *N.C. Comm'n of Indian Affairs v. U.S. Dep't of Labor*, 725 F.2d 238, 240 (4th Cir. 1984) (finding no *Chenery* problem because "the question of interpretation of a federal statute is not 'a determination or judgment which an administrative agency alone is authorized to make' ") (quoting *Chenery*, 332 U.S. at 89); *Milk Transport v. ICC*, 190 F. Supp. 350, 355 (D. Minn. 1960) (*Chenery* does not apply to the court's interpretation of a federal statute).

In this case, the court of appeals granted Arizona's and Home Builders' motions to intervene under § 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), and Rule 15(d) of the Federal Rules of Appellate Procedure. Arizona requested intervention to argue that "§ 7 of the Endangered Species Act could not legally preclude the transfer of NPDES authority to a state pursuant to 33 U.S.C. § 1342(b)." (State of Arizona's Motion to Intervene at 7.) The parties briefed that legal issue and the majority

reached the issue in holding that EPA's obligations under the Clean Water Act could not "relieve the EPA of its independent obligations under section 7(a)(2)." (NAHB Pet. App. 47.) Because the legal argument that Arizona raised was a sufficient basis for upholding EPA's approval of Arizona's permitting program, the majority erred in vacating the approval. This Court should review the EPA's decision because any inconsistencies in its decisionmaking involve the interpretation of federal statutes. Because the court of appeals misinterpreted these statutes, the Court should vacate its decision.

B. The Court Should Not Remand to the EPA Because Remand Is Futile and Detrimental to the States' Interests.

The EPA's decision to approve Arizona's program should not be remanded for clarification because this Court is free to, and should, review the court of appeals' erroneous construction of federal statutes. Moreover, the Court should not remand here because it would be futile. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 756 n.7 (1986), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992). ([T]he ruling in *Chenery* has not required courts to remand in futility."). To the extent that there was any inconsistency in the EPA's position on the applicability of Section 7(a)(2) to its approval of state permitting programs under the Clean Water Act, EPA has clarified its position in connection with Alaska's application for transfer of NPDES permitting authority. (EPA Pet. App. 93a-102a.) EPA's position is that the decision whether to approve the transfer of NPDES permitting authority to a State is not subject to the requirements of Section 7(a)(2) because Section 402(b) of the Clean Water Act requires that the

State's application be granted if the Clean Water Act criteria are satisfied. *Id.* The Service and the National Marine Fisheries Service have confirmed that their interpretations of the relevant statutory provisions are consistent with EPA's. (EPA Pet. App. 103a-116a.) Thus, remand would serve no purpose as EPA has clarified its position.

Remand is also inappropriate here because, until this Court determines whether Section 7(a)(2) applies to transfers of NPDES permitting authority to a State, the status of Arizona and Alaska's permitting programs[4] is uncertain. This Court should address the question so that States in the Ninth Circuit are not governed by rules that are different from those applied in all other circuits.

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[4] The State of Alaska has applied for transfer of NPDES permitting authority and has not yet received EPA approval of its permitting program. Brief of Amicus Curiae Alaska in Support of Petitions for Writ of Certiorari at 1.

CONCLUSION

This Court should vacate the judgment of the court of appeals and uphold EPA's approval of the Arizona's permitting program.

DATED: February 20, 2007.

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Nos. 06-340, 06-549

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS DEFENDERS OF WILDLIFE, *ET AL.*

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that EPA's decision to transfer permitting authority to Arizona under Section 402(b) of the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and, if so, whether the court of appeals should have remanded to EPA for further proceedings without ruling on the interpretation of Section 7(a)(2).

2. Whether EPA may raise in this Court a rationale for avoiding compliance with Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), that EPA not only failed to rely on during the administrative proceedings and before the Ninth Circuit issued its ruling, but which the agency expressly disavowed in the administrative proceedings and advised the court of appeals panel it was not raising.

3. Whether EPA must comply with Section 7(a)(2) of the Endangered Species Act when EPA authorizes States to administer the Clean Water Act permitting program, where Section 7(a)(2)'s requirements apply to "any action authorized, funded, or carried out" by a federal agency, 16 U.S.C. § 1536(a)(2), and this Court has already construed this language as "admit[ting] of no exception." *TVA v. Hill*, 437 U.S. 153, 173 (1978).

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in respondents' Brief in Opposition to Petitions for a Writ of Certiorari remains valid.

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STATEMENT

This case concerns the United States Environmental Protection Agency's ("EPA's") "final action authorizing Arizona to implement the NPDES [National Pollutant Discharge Elimination System] program," 67 Fed. Reg. 79,629, 79,631 (Dec. 30, 2002), and whether, in taking that action, EPA failed to comply with its duties under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"). Section 7(a)(2) of the ESA provides that "[e]ach federal agency *shall*, in consultation with and with the assistance of the Secretary [of the Interior], *insure that any action authorized, funded, or carried out* by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction" of the "critical" habitat of a listed species. 16 U.S.C. § 1536(a)(2) (emphasis added).

The plain terms of section 7(a)(2) therefore apply to EPA's action and, indeed, this Court has already ruled that the "language [of section 7] admits of no exception." *TVA v. Hill*, 437 U.S. 153, 173 (1978). Nonetheless, EPA and the National Association of Home Builders ("NAHB") contend that section 7(a)(2) "does not apply" to EPA's decisions on whether to transfer NPDES authority regardless of whether such transfers will lead to the extinction of federally protected species. EPA Br. at 42. This position is not only impossible to reconcile with the language and purpose of section 7(a)(2), but it also conflicts with (1) EPA's statements in the decision documents under review, (2) EPA's position in the court of appeals, and (3) additional published statements of agency policy adopted following public notice and comment proceedings.

According to petitioners, however, the Court should overlook EPA's conceded "confusion" and "misstatements of law" in the record, EPA Br. at 42, 45, 46, and instead "defer" to EPA's extra-record *post hoc* "clarification" that compliance with the ESA is never "required in this context." *Id.* at 38, 49. To endorse that position the Court would be compelled to discard fundamental principles of administrative law and judicial review, contort the language of the ESA beyond recognition, and ignore the Court's own ruling and reasoning in *Hill*. Rather, the case should be remanded to EPA for further administrative proceedings so that EPA may "clarify" its position based on a full administrative record, including important factual and legal considerations unaddressed in the extra-record explanation on which EPA asks the Court to rely.

To place these issues in legal and factual context, respondents will first summarize the "complementary" wildlife protection provisions of the two environmental statutes at issue, NAHB App. 274, and then describe EPA's shifting positions on compliance with section 7(a)(2).

A. Section 7 Of The Endangered Species Act

When Congress enacted the ESA in 1973, its "plain intent . . . was to halt and reverse the trend towards species extinction, whatever the cost." *Hill*, 437 U.S. at 184. The House Report relied on in *Hill* explained that "[f]rom all evidence available to us, it appears that the pace of disappearance of species is accelerating" and that

> [f]rom the most narrow possible point of view, it is in the best interests of mankind to minimize the loss of genetic variations. The reason is simple: they are potential resources. They are keys

> to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask . . . Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet to be [] discovered . . . Sheer self-interest impels us to be cautious.

H.R. Rep. No. 93-412, 93d Cong., 1st Sess. (1973) ("1973 House Report"), *reprinted in* A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1978, 1979, and 1980, at 144 (1982) (hereafter "ESA Leg. Hist.").

Congress determined that the "principal" threats to species are "pollution, destruction of habitat and the pressures of trade" and that strong federal legislation was essential because "protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies. . . ." 1973 House Report, ESA Leg. Hist. at 141, 146. Congress therefore passed "'the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.'" *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995) (quoting *Hill*, 437 U.S. at 180). The ESA "finds" that "species of fish, wildlife, and plants . . . in danger of or threatened with extinction" are of "[a]esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," and the Act's "purpose" is to provide a "program for the conservation" of such species, which means recovering them until the "measures provided pursuant to [this Act] are no longer necessary." 16 U.S.C. §§ 1531(a), (b); *id.* at § 1532(3).

The statute's "broad purpose," *Sweet Home*, 515 U.S. at 698, is reflected in section 7, which "provides a particularly good gauge of congressional intent." *Hill*, 437 U.S. at 181.

In *Hill*, the Court held that section 7's "very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species.'" *id.* at 173 (emphasis in original; internal citation omitted). The Court construed this language as flatly "'*prohibit[ing]* [a] federal agency from taking action which does jeopardize the status of endangered species.'" *Id.* at 179 (emphasis in original; internal quotation omitted).

In 1978, Congress ratified *Hill*'s plain language reading of section 7 and established a new mechanism for addressing unavoidable "conflicts" between the "primary missions" of federal agencies and the prohibition in section 7 on agency actions that jeopardize species and destroy critical habitat. H.R. Rep. No. 95-1625, 95th Cong., 2d Sess. (1978) ("1978 House Report"), ESA Leg. Hist. at 734, 737. While finding that the "consultation process" required by section 7 "can resolve many if not most of the conflicts that might develop under the Act," the relevant Congressional committees recognized that "there will continue to be some Federally authorized activities that *cannot be modified* in a manner which will avoid a conflict with a listed species." *Id.* at 737 (emphasis added). Accordingly, to address "those cases where a Federal action cannot be completed . . . without directly conflicting with the requirements of Section 7," *id.*, the 1978 amendments created a "process by which actions authorized, funded, or carried out by Federal agencies could be exempted from the provisions of the Act." S. Rep. No. 97-418, 97th Cong., 2d Sess. (1982) ("1982 Senate Report"), *reprinted in* NAHB App. 531.

Under Fish and Wildlife Service ("FWS" or "Service") regulations, each "action agency" triggers the section 7

process by determining if its action "may affect" a listed species or critical habitat; if so, the agency must conduct "formal consultation" with FWS, unless the Service concurs that the action is unlikely to "adversely affect" the species. 50 C.F.R. § 402.14(a), (b). The formal consultation process culminates in a "Biological Opinion" that "[e]valuate[s] the effects of the action," and determines whether it is "likely to jeopardize" any listed species or impair critical habitat. *Id.* at §§ 402.14(g)(3), (4); *see also Bennett v. Spear*, 520 U.S. 154, 158 (1997). This analysis must include all "direct," "cumulative," and "indirect effects," which are those "caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02. The agency must then determine "whether and in what manner to proceed," *id.* at § 402.15(a), to ensure that the "action" does not "jeopardize" any listed species or "result in" the destruction or "adverse modification" of "critical" habitat. 16 U.S.C. § 1536(a)(2).

For example, if the FWS finds that the action will "result in" destruction of critical habitat, the action agency must determine whether to adopt any "reasonable and prudent alternatives" proposed by the Service to avoid that result. 16 U.S.C. § 1536(b)(3)(A). If there are no such "alternatives" within the agency's statutory authority, the recourse for the agency or other affected parties is to seek an exemption from the Endangered Species Committee. *Id.* at § 1536(h)(1)(A)(I).

Pursuant to the exemption process, any federal agency, "permit or license applicant," or the "Governor of the State in which an agency action will occur," may "apply . . . for an exemption" if FWS determines, after consultation, that the "agency action would violate" section 7(a)(2) but the Service and agency are unable to develop a

"reasonable and prudent alternative" the agency can implement to avoid that result. 16 U.S.C. §§ 1536(g)(1), (3). The ultimate decision to grant such an exemption is vested in an "Endangered Species Committee" composed of high-ranking federal officials, including the Administrator of EPA, and one representative from "each affected State." *Id.* at §§ 1536(e)(1), (3). If the Committee grants an exemption, it also "establish[es]" measures "to minimize the adverse effects of the agency action" on endangered species regardless of whether the agency has authority to implement such measures under its own statute. *Id.* at § 1536(h)(1)(B).[1]

B. Pertinent Provisions Of The CWA

The "broad purpose" of the Clean Water Act ("CWA") is "'to restore and maintain the chemical, physical, and *biological integrity* of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 105-06 (1992) (quoting 33 U.S.C. § 1251(a)) (emphasis added). Accordingly, the CWA, enacted in 1972, establishes a "national goal" of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife. . . ." 33 U.S.C. § 1251(a)(2).[2]

---

[1] Because of its extraordinary power to authorize a federal action that may result in the extinction of a species, the Committee is "euphemistically known as the 'God' committee." Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 Envt'l L. 499, 560-61 (1991).

[2] *See also* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76 (1972) (The CWA's "objective" is the "restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters . . . The word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is maintained.").

The CWA "anticipates a partnership between the States and the Federal Government" and "provides for two sets of water quality measures." *Arkansas*, 503 U.S. at 101 (internal citation omitted). First, the CWA requires EPA to issue technology-based "[e]ffluent limitations," 33 U.S.C. § 1311, including limitations needed to "assure . . . protection and propagation of a balanced population of shellfish, fish, and wildlife." *Id.* at § 1312(a). Second, the States and EPA jointly develop "[w]ater quality standards" so that pollution sources "may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). These standards must also "tak[e] into consideration the[] use and value" of navigable waters for the "propagation of fish and wildlife." 33 U.S.C. § 1313(c)(2)(A).

States must submit proposed water quality standards for review by EPA, and if the "State fails to comply with [EPA's] recommendation, the Act authorizes the EPA to promulgate water quality standards for the State." *Arkansas*, 503 U.S. at 101. Hence, the States and, if necessary, EPA establish water quality standards that provide "for the protection and propagation of fish, shellfish, and wildlife." 40 C.F.R. § 131.2.

The NPDES program is the "primary means for enforcing these limitations and standards," *Arkansas*, 503 U.S. at 101, because the CWA prohibits point sources from discharging pollutants into navigable waters without a permit. *See* 33 U.S.C. § 1311(a). Section 402 of the Act, 33 U.S.C. § 1342, "establishes the NPDES permitting regime, and describes two types of permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program

administered by the EPA." *Arkansas*, 503 U.S. at 105. Thus, the States play an important role in implementing the program, but "Congress has vested in [EPA] broad discretion to establish conditions for NPDES permits," and "[s]imilarly, Congress preserved for [EPA] *broad authority to oversee state permit programs*[.]" *Id.* (emphasis added).

Consistent with EPA's "broad authority" over the program, it is *not* the case that Congress imposed a ministerial duty on EPA to transfer permitting authority to the States. To the contrary, while section 402(b)(1) provides that EPA "shall approve" the transfer of permitting authority when EPA finds that a State has met nine criteria, EPA can and does employ considerable discretion – or, in the government's words, an "exercise of judgment," EPA Br. at 17 – in assessing and applying those criteria, which range from the specific to the very general. Of particular relevance here, several of the statutory factors as to which EPA exercises "judgment" encompass the wildlife-related concerns that are manifested throughout the CWA scheme.

For example, one general criterion is whether the State has "adequate authority" to "apply, and insure compliance with" multiple provisions of the CWA. 33 U.S.C. § 1342(b)(1)(A). In turn, one of those provisions concerns any "effluent limitations" established for the "protection and propagation of a balanced population of shellfish, fish and wildlife. . . ." *Id.* at § 1312(a). Another requires that all permits satisfy "any applicable water quality standard[s]," *id.* at § 1311(b)(1)(C), including those that protect the "use and value" of navigable water bodies "for . . . propagation of fish and wildlife." *Id.* at § 1313(c)(2)(A). Through these and other transfer criteria, therefore, EPA has the responsibility under the CWA to evaluate the adequacy of a State's program to provide for

the "protection and propagation of fish, shellfish, and wildlife." If EPA "determines" that a State's program is not "adequate" in that or any other respect, it denies the transfer. *Id.* at § 1342(b).[3]

Even after EPA authorizes a State to administer the NPDES program, "Congress intended to grant the [EPA] discretion in [its] oversight of the issuance of NPDES permits." *Arkansas*, 503 U.S. at 106; *see also* NAHB App. 97. The State must advise EPA of each permit it "propose[s]" to issue, 33 U.S.C. § 1342(d)(1), and EPA may "object" to any permit. *Id.* at § 1342(d)(2); *see also* 40 C.F.R. § 123.44(c). The State must then either address EPA's concerns or authority over the permit reverts to EPA. 33 U.S.C. § 1342(d)(4). In addition, the State must enter into a Memorandum of Agreement with EPA that is "consistent with EPA's statutory oversight responsibility" and "include[s] other terms, conditions, or agreements" deemed "relevant to the administration and enforcement of the State's regulatory program." 40 C.F.R. § 123.24(a). States must also provide draft permits to the FWS and all other "Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources. . . ." *Id.* at § 124.10(c)(iii).

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[3] That EPA in fact exercises considerable discretion in determining whether, and on what terms, to delegate NPDES authority to a State is also reflected in EPA's solicitation and consideration of public comments on a State's application to administer the NPDES program. *See* 40 C.F.R. § 123.61(b); *see also* Joint Appendix ("J.A.") at 194-256 (addressing public comments on Arizona's application).

C. EPA's Past Successful Compliance With Section 7(a)(2) And The CWA In Making NPDES Transfer Decisions

EPA's new position that it is impossible to comply with both section 7(a)(2) of the ESA and section 402(b)(1) of the CWA is directly at odds with EPA's and FWS's past declarations and actions. In public notice and comment proceedings, EPA has repeatedly determined that it *must* comply with section 7(a)(2) in making transfer decisions, and the agencies have *successfully* used the section 7(a)(2) consultation process to evaluate and mitigate the potential adverse effects of such decisions on federally listed species.

With regard to Florida's application, for example, the federal agencies, together with the State, agreed to a process "for close coordination between EPA, the State, and the Service[] to ensure that the state-issued permits are not likely to jeopardize the continued existence of Federally listed species." 60 Fed. Reg. 25,718, 25,719 (May 12, 1995). In connection with Oklahoma's application, EPA and FWS complied with section 7(a)(2) and agreed, along with the State, that FWS would have an opportunity to "confer on permits which are likely to affect federally listed species." 61 Fed. Reg. 65,047, 65,053 (Dec. 10, 1996). In response to comments, EPA declared that "consultation conducted on the authorization of a state NPDES program is consistent with the intent, definitions and the requirements of the ESA and CWA," and that "[t]he approval of a state program under section 402 of the CWA is a federal authorization and not simply a review of the state's documents. EPA views the approval as 'discretionary.'" *Id.* at 65,051.

Likewise, before EPA granted Texas's application, FWS issued a Biological Opinion that found that the

State's water quality "standards require that permits be written in such a manner that would avoid jeopardy to aquatic and aquatic dependent wildlife (including listed species). . . ." 63 Fed. Reg. 51,164, 51,196 (Sept. 24, 1998). EPA and FWS also "developed procedures for ensuring the protection of endangered and threatened species" following the transfer of authority, including by "facilitat[ing] coordination among the federal agencies and timely communication of information and recommendations to the State." *Id.* at 51,198. In response to public comments, EPA again stated that "section 7 does apply to its action. . . ." *Id.*

In 2001, after again soliciting public comment, EPA and FWS jointly published in the Federal Register a "Memorandum of Agreement" that "address[ed] interagency coordination under" the CWA and ESA, NAHB App. 245, and "ensure[d] that EPA actions meet the substantive requirements of section 7(a)(2). . . ." *Id.* at 253. Emphasizing that the "ESA requires the involvement of all Federal agencies in the protection and recovery of our Nation's unique biological resources," *id.* at 274, the agencies confirmed that "EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species." *Id.* at 260.[4]

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[4] EPA's compliance with section 7(a)(2) was consistent with positions it took in cases brought by industry groups in the Fifth and Tenth Circuits. EPA argued that consultation with FWS is necessary to "satisfy EPA's obligations under ESA section 7(a)(2)," and that the contrary position is a "myopic approach [that] ignores the plain language of ESA section 7(a)(2), the Supreme Court's expansive reading of agency action in section 7, the broad regulatory definition of 'action'

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D. EPA's Internally Inconsistent Approach To Section 7(a)(2) When Considering Arizona's Application

As the government acknowledges, the administrative record reflects EPA's "confusion," to say the least, concerning its section 7(a)(2) obligations in reviewing Arizona's transfer application. EPA Br. at 42. In fact, not only was EPA's position internally inconsistent, but there were serious conflicts between EPA and FWS officials who believed that without appropriate safeguards the transfer could lead to the extinction of federally protected species.

1. In 2002, Arizona "submitted a request for [EPA's] approval" to regulate "most discharges of pollutants subject to the federal NPDES program," including "storm water point source discharges," "industrial wastewater," and "discharges from federal facilities." NAHB App. 543,

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and 'effects of the action' in the ESA implementing regulations, and EPA's role in approving state applications." Brief for the Respondents at 29, 30, *American Forest & Paper Ass'n v. EPA*, No. 96-60874 (5th Cir. 1997) (hereafter "EPA 5th Cir. Br.") (reproduced in Addendum to Respondents' Court of Appeals' Reply Brief).

Neither the Fifth nor Tenth Circuits disagreed with EPA's position that section 7 compliance is mandatory. The Tenth Circuit did not reach the merits. The Fifth Circuit suggested that section 7(a)(2) *does* "require[] EPA to consult with FWS" before making an NPDES transfer decision, *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998), but ruled against EPA on the narrower ground that EPA could not "require" the State to consult with federal agencies regarding the impact of state-issued permits on endangered species. *Id.* at 297. EPA subsequently explained to the public that it "believes that this case was wrongly decided," 64 Fed. Reg. 2,742, 2,746 (Jan. 15, 1999), but EPA nonetheless complied with it by devising, along with FWS, species safeguards that did not impose any consultation duties directly on States. *See, e.g.*, 63 Fed. Reg. 51,164, 51,198 ("EPA and the Services have developed procedures for ensuring the protection" of species that "do not impose obligations, procedural or otherwise, on the State").

550. Arizona also requested that the federal government *fund* much of its program. *Id.* at 567; J.A. 44.

When soliciting public comments, EPA stated that it would "not make a final decision on [] program approval until after . . . completion of the ongoing consultations with the [FWS] on effects program approval may have on endangered or threatened species." NAHB App. 546. As before, EPA declared that

> *the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service* on the effects of federal actions on endangered species. *EPA has determined that its action on the AZPDES program application constitutes a federal action that is subject to section 7 of the ESA.* Section 7(a)(2) of the ESA places a statutory requirement (*separate and distinct from CWA section 402(b)*) for EPA to '* * * insure that any action . . . * * * is not likely to jeopardize the continued existence of any endangered species or threatened species'. . . .

Id. at 548 (emphasis added; ellipses in original).

EPA initiated section 7 consultation by providing FWS with a "Biological Evaluation" that "discuss[ed] the effects of [EPA's] approval" of the Arizona program, and acknowledged that "all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters in Arizona may be affected by the action." NAHB App. 587, 614. EPA attached a list of 60 federally listed species that could be harmed by the transfer. *Id.* at 621-23.

EPA recognized that projects requiring NPDES permits may have "detrimental effect[s] on Federally-listed species and habitats" and that an immediate consequence of the transfer decision would be "a reduction in

the number of mechanisms available . . . to protect Federally-listed species," *i.e.*, "[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 processes for consultation will no longer apply." NAHB App. 610, 615. EPA asserted, however, that various measures would adequately protect species in the absence of section 7 safeguards. *Id.* at 617.

2. If FWS had concurred with this conclusion, the consultation would have ended at that point. *See* 50 C.F.R. § 402.14(b). But FWS did not agree because its biologists concluded that, in the absence of additional safeguards, the transfer would in fact "result in significant effects to the[] survival and recovery" of various endangered species "through destruction, degradation, and fragmentation of their habitats." J.A. 54; *see also id.* at 31.

For example, Service biologists explained that FWS reviews of NPDES permits issued by EPA had been vital in protecting the Southwestern willow flycatcher, a highly endangered bird species dependent on river ecosystems in Arizona. *See* J.A. 39, 43. Because the Service's ability to provide such essential protections would be lost upon transfer of the NPDES program, Service biologists concluded that, in the absence of agreed-on protections, the transfer "could have a devastating effect" on survival of the flycatcher. *Id.* at 39. Service biologists expressed similar concerns about the fate of other animal species, such as bald eagles and certain endangered fish species.[5]

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[5] FWS biologists believed that the transfer could harm both aquatic and upland species that had in fact benefitted greatly from section 7 consultations on NPDES permits. *See, e.g.*, J.A. 41 (describing potential adverse impacts on "eagle breeding areas"); *id.* at 52 (finding that listed fish species "may be adversely affected").

FWS scientists also concluded that without additional safeguards the transfer would "appreciably reduce the conservation status" of federally protected plants because

> [g]reat strides in minimizing the disturbance of construction projects in the range of these species to provide for their survival and recovery will be diminished, if not lost . . . [T]his action is more than a shift in program authority; we will lose our section 7 nexus for consultation, and construction projects . . . *will destroy important habitat and adversely affect listed species.*

J.A. 46 (emphasis added). With regard to the Huachuca water umbel, an aquatic plant "dependent on steady water levels for habitat stability," FWS biologists determined that "[s]ection 7 consultations with EPA" on NPDES permits "have allowed for the development of conservation measures that minimize the impact of water withdrawals" in critical habitat but that, in the absence of adequate protections, the transfer of authority "could compromise the water quantity in critical habitat, *reducing the likelihood of the long-term survival and recovery*" of the species. J.A. 49 (emphasis added).[6]

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[6] Service biologists also concluded that the transfer could lead to the rapid extinction of another plant endangered by ongoing habitat destruction because, of the species' dwindling habitat that had been protected in some manner, nearly *half* had been "conserved through conservation measures gained through section 7 consultation with EPA" on NPDES permits and, "[w]ith no conservation measures in place with EPA and the State" tailored to the plant, the "species will be at risk of severe decline." J.A. 47-49. The biologists further found that no other existing federal or states measures would address adverse effects to listed plants because the ESA's general prohibition on "taking" members of a listed species does not apply to plants on private land, *see* 16 U.S.C. § 1538(a)(2)(B), and there is no Arizona statute or

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3. EPA and FWS disagreed on how these serious impacts should be addressed under section 7(a)(2). However, in contrast to the *post hoc* position EPA is now urging – *i.e.*, that compliance with section 7(a)(2) "is not required" on transfer applications under *any* circumstances, EPA Br. at 49 – the agencies' disagreement related to the *scope* of the required analysis. EPA officials maintained that, while they *were* required to comply with section 7(a)(2), the Biological Opinion should focus on analyzing adverse effects over which EPA believed it had statutory authority under the CWA, *i.e.*, adverse impacts "relating to both aquatic and upland species *if they are water quality-related.*" J.A. 143 (emphasis added).

In contrast, FWS took the position that, once consultation is initiated, the "Service must analyze all potential effects (i.e., direct, indirect, and cumulative effects)," and that the "action agency's ability to control those effects is irrelevant to the analysis." J.A. 143. FWS officials further explained that, if such an analysis yielded a "jeopardy determination" but the Service and EPA could not devise a "reasonable and prudent alternative" that would avoid extinction, EPA or Arizona could seek "an exemption via" the Endangered Species Committee process. *Id.*[7]

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regulation that forbids the destruction of federally listed plants. *See* NAHB App. 57.

[7] *See also* J.A. 148 ("The indirect effects of future permitted actions could result in a jeopardy biological opinion on EPA's approval of the assumption by Arizona."); *id.* at 140 ("EPA has backtracked on [its] commitment to consider both the direct and indirect effects . . . [T]hey will only address impacts to listed species directly related to water quality.").

4. The Biological Opinion that resulted from this interagency dispute is a hybrid of the agencies' legally incompatible positions. The Opinion reiterates EPA's and FWS's longstanding recognition that the "proposed approval" of a State permitting program *is* a federal "action" subject to section 7(a)(2), and also that the ESA and CWA are "consistent" statutory schemes. NAHB App. 82, 84. Indeed, the document stresses that:

> [t]he environmental protection goals of the CWA contain specific references to protecting 'fish,' 'shellfish,' 'wildlife,' and 'aquatic life,'; *these terms clearly encompass federally listed and proposed species.* Section 101(a) provides as its goal to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' 33 U.S.C. § 1251(a)(2). *This goal is consistent with the ESA's purpose of providing 'a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.'*

NAHB App. 84 (emphasis added).

The Opinion further states that "we [FWS] have expressed concerns that the approval will result in a loss of section 7 consultation-related conservation benefits" for various species, NAHB App. 111-12, and that the "loss of conservation benefits as an indirect effect *will appreciably reduce the conservation status*" of several species. *Id.* at 112 (emphasis added); *see also id.* at 110, 111. The Opinion also suggests that these anticipated adverse effects *should* be addressed under section 7(a)(2) because *"[r]egarding causation, the FWS uses the 'but for' test.* This test means that a Federal action is the cause of an effect if . . . 'but for' the action the effect would not have occurred." NAHB App. 112 (emphasis added). Yet, while recognizing that some

listed species *would* lose "conservation benefit[s]" that had proven crucial to their survival, *id.*, and that this loss of protection would *not* occur "but for" the transfer decision, the Opinion fails to analyze whether this impact will *in fact* lead to species jeopardy or loss of critical habitat, or whether the agencies should, as in past consultations, agree on measures to prevent those impacts.

Instead, several pages after stating that FWS uses a "but for" test, the Opinion applies a very different causation rationale to *avoid* addressing those impacts, asserting that the "action, as proposed is not likely to jeopardize" affected species because the "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program," but, rather, by "Congress' decision" in 1972 to enact section 402(b) of the CWA. NAHB App. 114, 116. Nonetheless, EPA's final decision "approv[ing] the application" *again* advised the public that EPA had completed the "consultation process *required* by ESA section 7(a)(2)" and that its "approval of the State program meets the *substantive* requirements of the ESA." NAHB App. 73 (emphasis added).

E. Proceedings Below

Because EPA conceded that it *was* required to comply with section 7(a)(2), respondents brought a straightforward "arbitrary and capricious" challenge to the adequacy and logical consistency of the Biological Opinion and EPA's reliance on that document. Respondents argued that, as in past consultations on transfer applications, the Opinion should at least address how endangered species will in fact be affected by the transfer and, if jeopardy or critical habitat destruction will result, either fashion a "reasonable and

prudent alternative" or refer EPA and Arizona to the Congressionally-mandated exemption process. While defending its decision, EPA repeatedly advised the court of appeals that it was *not* arguing that NPDES transfer decisions are non-discretionary actions, or that such decisions may avoid section 7(a)(2) compliance for any other reason.[8]

In ruling that EPA's reliance on the Biological Opinion was arbitrary and capricious, the court of appeals reasoned that the section 7(a)(2) obligation to avoid jeopardy is coterminous with the duty to consult – *i.e.*, both are triggered by "any action authorized, funded, or carried out by such agency" – and

> this being the case, the two propositions that underlie the EPA's action – that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision – cannot both be true. Because the agency's decisionmaking was based on contradictory views of the same words in the same statutory provision, the ultimate decision was not the result of reasoned decisionmaking.

NAHB App. 26-27. While it was unnecessary for the court of appeals to go beyond this rationale for remanding to EPA, the court also explained that EPA's position that it

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[8] *See* EPA's Court of Appeals' Answering Brief, at 31 n.9; *see also* J.A. 321-22, 325. Because EPA had recognized that it *was* required to comply with section 7(a)(2) and respondents' sole concern was with the adequacy of that compliance, respondents, while never conceding that the CWA transfer criteria were satisfied, did not base their challenge on them.

was under no obligation to address the actual effects of its transfer decision was contrary to the language of section 7(a)(2), that provision's legislative history and patent purpose, and *Hill*. The court, however, did not hold that EPA could not approve the transfer but, rather, remanded the matter for a "more careful consideration of the actual protection" that would be afforded by other federal and state measures following transfer. *Id.* at 61.

SUMMARY OF ARGUMENT

1. EPA now agrees that the court of appeals correctly ruled that EPA's approach to section 7(a)(2) reflected an internally inconsistent interpretation of the meaning and function of the provision. Therefore, in accordance with established principles of administrative law, the case should be remanded to EPA for further proceedings, notwithstanding EPA's extra-record *post hoc* effort to "clarif[y]" its position for the first time in this Court. EPA Br. at 49.

2. Should the Court nevertheless address whether section 7(a)(2) applies in this context, petitioners' position that section 7(a)(2) has no bearing on NPDES transfer decisions contradicts the plain language of the ESA, which provides that EPA must "insure that *any action authorized, funded, or carried out*" by EPA is "not likely to jeopardize the continued existence of species or result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). In *Hill*, this Court ruled that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer." 437 U.S. at 173. Those "terms" apply squarely to EPA's "final action authorizing

Arizona to implement the NPDES program," 67 Fed. Reg. 79,631, as well as to EPA's expenditure of federal funds on the program. Petitioners' position also flies in the face of Congress's response to *Hill*, which ratified this Court's plain language reading while also creating an exemption process for the specific purpose of *resolving* any intractable conflicts between section 7(a)(2) and agency actions under other statutes. Thus, in sharp contrast to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") – which imposes "only procedural requirements on federal agencies," *Department of Transportation v. Public Citizen*, 541 U.S. 752, 756-57 (2004) – section 7 contains a "flat ban" on agency actions likely to result in jeopardy to listed species or the "destruction of critical habitats," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982), and also sets forth a Congressionally-mandated process for resolving any conflicts between that "ban" and agency actions under other statutes.

3. Petitioners' arguments are predicated on the demonstrably erroneous premise that it is impossible for EPA to comply with *both* section 7(a)(2) and section 402(b)(1) of the CWA, and hence that the agencies (and the Court) must, in effect, choose sides in a battle of statutory commands. However, as EPA and FWS have announced to the public, the "CWA and ESA [are] compatible and complementary" statutes that "contain powerful tools that, when integrated effectively, will advance the objectives of both Acts." NAHB App. 267, 274. Accordingly, as demonstrated by EPA's and FWS's past *successful* efforts at compliance with *both* laws – in which State applications were approved *and* sensible steps were taken to safeguard federally protected species – the federal agencies' real-world

experience belies any need to read these statues as being in unavoidable conflict.

4. On close inspection, petitioners are actually asking the Court to create a gaping loophole in section 7(a)(2) that bears no relationship to the words or extinction prevention purpose of the provision. Thus, if the Court were to rule that section 7(a)(2) does not apply simply because Congress established criteria for EPA to apply in making transfer decisions (criteria that in fact encompass a consideration of wildlife concerns) section 7(a)(2) will be gutted, because Congress *generally* legislates by delineating the factors that agencies consider in making decisions. But as *Hill* makes crystal-clear, section 7(a)(2) was enacted so that agencies would *also* be required to address endangered species impacts before taking action. If petitioners believe that is bad public policy, their proper recourse is with Congress, rather than asking this Court to rewrite section 7(a)(2).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT EPA'S DECISION WAS ARBITRARY AND CAPRICIOUS AND THE CASE SHOULD BE REMANDED ON THAT BASIS

A. EPA Now Concedes That Its Approach To Section 7(a)(2) Was Internally Inconsistent And Confusing

EPA now agrees that the court of appeals was "correct" in ruling that EPA's decision was based on inconsistent interpretations of section 7(a)(2):

> *[T]he court of appeals was correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand, and that Section 7(a)(2) does not require federal agencies to consult about conduct to which the no-jeopardy mandate does not apply.* The court was also correct that the course of agency proceedings in this case reflected a *degree of confusion* regarding the ESA's application to the NPDES transfer decision.

EPA Br. at 42 (emphasis added). Evidently, therefore, the government concurs with the court below that EPA's decision reflects an arbitrary, if not "nonsensical," view that EPA "had to consult but had no authority to do anything concerning the matter about which it had to consult." NAHB App. 25-26. Indeed, EPA goes so far as to characterize its own decision documents as being based on a "misstatement of law," EPA Br. at 45, a "misperception" and "erroneous view" of the meaning of section 7(a)(2), *id.* at 46, and a "failure . . . to appreciate the full logical implications" of the agency's position before the court below. *Id.* at 47.

Ordinarily, such concessions of legal "confusion" and internal inconsistency should result in the case being remanded to the agency for "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 56-57 (1983) ("*State Farm*"). As the Court has explained:

> [i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or *if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the*

> *agency for additional investigation or explanation.*

Florida Power & Light Corp. v. Lorion, 470 U.S. 729, 744 (1985) (emphasis added); *see also SEC v. Chenery*, 332 U.S. 194, 196-97 (1947) ("If the administrative action is to be tested by the basis on which it purports to rest, that basis must be set forth with such clarity as to be understandable.").[9]

B. EPA Cannot Avoid A Remand Based On Its Extra-Record *Post Hoc* Explanation

Here, petitioners present "no special circumstances," *Gonzales v. Thomas*, 547 U.S. 183, 126 S. Ct. 1613, 1615 (2006), that justify deviating from what the government acknowledges are "established principles" of administrative law. EPA Br. at 48 n.17. To the contrary, EPA seeks to sidestep these principles by resorting to the kinds of "'*post*

[9] As noted earlier, the record reflects not only a now-conceded incongruity in EPA's view on the applicability of section 7(a)(2) as a whole, but also a related inconsistency in the Biological Opinion concerning how the "effects" of an action should be analyzed once section 7(a)(2) *is* triggered. The Opinion says that FWS uses a "but for" test in assessing such effects, NAHB App. 112, and that statement is consistent with other explanations of the Service's longstanding approach. *See* 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (preamble to ESA regulations). But the Opinion then applies a different "*legal* cause" analysis, EPA Br. at 25 (emphasis added), to avoid evaluating all of the actual impacts on endangered species. This discordance affords an additional basis on which the case should be remanded on arbitrary and capricious grounds. *See, e.g., New England Coalition on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1130 (D.C. Cir. 1984) (Scalia, J.) (where an agency may choose between two approaches to a problem, the agency cannot say it is "adopt[ing] one and [then] apply the other. To do so is the essence of arbitrary and capricious action.") (internal quotation omitted).

hoc rationalizations'" the Court has long held "to be an inadequate basis for review" of agency action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168-69 (1962)).

EPA contends that the Court need not remand because the "federal agencies have since" – *i.e.*, "since" the agency decision under review was made – "clarified their understanding of the legal principles that govern in this setting." EPA Br. at 42. This "clarification" – which is actually a *reversal* of the agencies' prior policy – is that section 7(a)(2) compliance is "not required in this context." *Id.* at 49. The government acknowledges that this newly-minted argument conflicts with EPA's declarations in connection with past NPDES transfer decisions that section 7(a)(2) compliance *is* mandatory, as well as with EPA's published positions "[a]t both the beginning and the end of the consideration of Arizona's transfer application." *Id.* at 6, 44. Nonetheless, EPA maintains that because it has now provided *this* Court with the "very clarification that *might have occurred* if the court of appeals had . . . remanded for further administrative proceedings," the Court should decide the case based on EPA's new "understanding" of its statutory duties. *Id.* at 49 (emphasis added).

The Court should decline this invitation to dispense with fundamental principles of administrative law and appellate review. EPA's purported "clarification" took place not only long after EPA decided to transfer authority to Arizona, but many months after the court of appeals issued its ruling based on the administrative record. Indeed, the agency's revised position – as embodied in an October 2006 unpublished "exchange of letters," EPA Br.

at 37-38 – was hastily developed during the time that EPA was asking this Court for extensions of time to file its petition for certiorari. *See* EPA's 9/26/06 Application for a Further Extension of Time, at 5. Plainly, having lost below – including on the now-conceded ground that its approach to section 7(a)(2) was internally inconsistent – EPA set out to manufacture a *new* "clarified" position that the agency now seeks to substitute in this Court for the admittedly "confus[ing]" rationale invoked in the administrative proceeding and presented to the court of appeals. EPA Br. at 42.

There are good reasons, however, why this Court has ruled that such *post hoc* explanations "cannot serve as a sufficient predicate for agency action." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981). They are

> incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate the administrative process, for the purpose of the rule is to avoid 'propel(ling) the court into the domain which Congress has set aside exclusively for the administrative agency.'

Burlington Truck Lines, 371 U.S. at 168, 169 (internal citation omitted).

This interest in protecting the "orderly functioning of the process of judicial review," *id.*, is at its zenith in this case because the letters on which EPA is now relying were not available to either the court of appeals or the parties in the court below. In other words, EPA has compounded its administrative law violation by *also* disregarding this Court's directive that the Court ordinarily refrains from even considering facts and materials that are "not part of

the record" compiled in the court below "[b]ecause this Court must affirm or reverse upon the case as it appears in the record. . . ." *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488 n.5 (1986); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 278 n.5 (1986).[10]

C. EPA's "Harmless Error" Argument Is Baseless

1. EPA also argues that a remand is unnecessary because "'[i]n administrative law . . . there is a harmless

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[10] EPA's reliance on *Auer v. Robbins*, 519 U.S. 452, 461 (1997), for the novel proposition that the Court should not only consider but "defer" to the agency's *post hoc* explanation, EPA Br. at 38, is misplaced. In *Auer*, the Court did not consider a challenge to an agency action but, rather, resolved litigation between two private parties that turned in part on the meaning of a regulation previously issued by the Department of Labor. Accordingly, the Court requested the Secretary of Labor to file an *amicus* brief explaining how the agency's regulations applied to the case. *Auer*, 519 U.S. at 461. In relying on the interpretation it had requested, the Court explained that, under the "circumstances of this case," the "Secretary's position *is in no sense* a '*post hoc* rationalizatio[n]' advanced by an agency *seeking to defend past agency action against attack*." *Id.* at 462 (internal quotation omitted; emphasis added). Here, in contrast, the rapid-fire "exchange of letters" that was evidently engineered for the purpose of bolstering EPA's position in this Court constitutes the quintessential *post hoc* effort to "defend past agency action against attack." *See* EPA App. 93a-110a (indicating that EPA sent letters on October 13, 2006, and received nearly identical responses from FWS and the National Marine Fisheries Service *four and five days later*, and that these responses were received less than one week before EPA filed its petition for certiorari). In this connection, it is also noteworthy that the Alaska application the letters purport to address has not even been noticed for public comment in the Federal Register because the application was deemed seriously deficient by EPA on various grounds. *See* http://www.dec.state.ak.us/water/npdes/pdfs/WG_mtg_13_Handout_5.pdf.

error rule,'" EPA Br. at 45 (quoting *PDK Labs., Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)), and "[r]espondents [] were not prejudiced by EPA's erroneous view that the consultation was required by Section 7(a)(2)." EPA Br. at 46. Petitioners made no such "harmless error" argument in the court of appeals, and hence it should be deemed waived. *See, e.g.*, *Hormel v. Helvering*, 312 U.S. 522, 556 (1941). But even if the Court entertains this new argument, respondents have in fact been severely "prejudiced" by EPA's shifting, inconsistent positions on its section 7(a)(2) responsibilities, as well as by its belated attempt to clarify its position for the first time in this Court.

In addition to the patent unfairness of putting respondents in the position of having to address in this Court a "clarified" explanation that was not raised in either the administrative process or the court below, EPA is effectively nullifying respondents' rights to participate in *administrative proceedings* concerning Arizona's application, and particularly respondents' rights *under EPA's own regulations* to comment on NPDES transfer applications. *See* 40 C.F.R. § 123.61(b). Because EPA, both in past published pronouncements and in soliciting comments on Arizona's transfer application, declared that EPA *is* required to comply with section 7(a)(2), EPA Br. at 44, under established administrative law principles the agency's revised understanding of its legal obligations should *at least* be exposed to public comment *before* being adopted and subjected to judicial review. *See, e.g.*, *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("Once an agency gives its regulations an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process

of notice and comment rulemaking.") (internal quotation omitted).

2. Moreover, this is hardly a case in which further agency proceedings – including EPA entertaining public comment on its modified position – would be a pointless exercise. Rather, as might be expected from a hurried, litigation-driven "clarification," the "exchange of letters" avoids important issues that could – and should – be addressed by EPA in the first instance through remanded administrative proceedings. The agency's consideration of these issues may persuade it to adopt a different approach and would at least result in a more complete record for judicial review.

For example, as noted, EPA not only "authori[zed]" and "approved" Arizona's application, NAHB App. 69, 76, but, at Arizona's request, EPA also committed substantial federal *funds* to the Arizona NPDES program. *See* J.A. 53 ("EPA has committed to funding [the Arizona program] for the next three years"). While FWS maintained that EPA's funding of the State program was an *independent* basis for triggering section 7(a)(2) duties, *see* 16 U.S.C. § 1536(a)(2), this issue was largely of academic significance in view of EPA's concession that consultation was required by *authorization* alone. *See* J.A. 44 (EPA disagreed that it must consult on "funding" of Arizona's program but conceded an obligation to consult on "delegation of the program").

However, in view of the agencies' "clarified" position that EPA's "authorization" was insufficient to require compliance with section 7(a)(2), EPA's funding of Arizona's program becomes a far more crucial consideration, because section 7(a)(2) applies to "any action . . . funded" by a federal agency. 16 U.S.C. § 1536(a)(2). At the very least,

given EPA's belated reversal of its longstanding position that program authorization alone is an adequate basis for section 7(a)(2) compliance, a remand should at least address whether, in the agencies' view, authorization *along with* federal funding is sufficient to trigger full section 7(a)(2) compliance.

3. Another issue that respondents (if afforded the opportunity) would urge EPA to address on remand is how EPA reconciles its revised position regarding section 7(a)(2) with the manner in which the agency has dealt with *other* overarching legal obligations imposed on federal agencies but not enumerated in the transfer provision. Thus, EPA's *post hoc* position is that section 7(a)(2) should be ignored because "[n]one of the nine criteria contemplate or provide for consideration of potential effects to listed species [or] critical habitat." EPA App. 97a. In reality, as previously explained, the CWA criteria *do* "provide for consideration" of wildlife impacts and, indeed, the Biological Opinion recognizes that the CWA's "specific references to protecting 'fish,' 'shellfish,' 'wildlife,' and 'aquatic life' . . . clearly encompass federally listed and proposed species." NAHB App. 84.

Even aside from this conflict between EPA's *post hoc* position and the Biological Opinion actually before the Court, EPA's new explanation raises the important question of whether the agency is acting consistently with *other* statutory and legal obligations with far less of a relationship to the transfer criteria than federally protected wildlife. *See Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (agency's "[u]nexplained inconsistency" may afford a basis for "holding an interpretation to be an arbitrary and capricious change from agency practice"). For example,

when announcing its decision on the Arizona application, EPA explained that the National Historic Preservation Act, 16 U.S.C. § 470(f) ("NHPA"), "requires Federal agencies to take into account the effects of their undertakings on historic properties." NAHB App. 73. Although such "effects" are not mentioned in the CWA transfer criteria, EPA explained that it had complied with the "coordination process" required by the NHPA. *Id.* at 74. Similarly, in responding to comments submitted by the Inter-Tribal Council of Arizona, EPA stated that, "consistent with the federal trust responsibility" towards Native-American tribes, EPA would take steps, post-transfer, to address "matters that arise under the [Arizona] program which may affect Tribes, including issues related to permits that may have a potential adverse effect on tribal historic properties." J.A. 203. EPA did not suggest that it could disregard the "trust responsibility" towards Native-Americans because it is not enumerated in the CWA.

As now "clarified" therefore, EPA's anomalous position appears to be that section 7(a)(2) is the *only* legal obligation imposed on the federal government that EPA should ignore in making NPDES transfer decisions – although Congress intended to "afford[] endangered species the highest of priorities. . . ." *Hill*, 437 U.S. at 194. At the very least, respondents are indeed "prejudiced by the absence of an opportunity" even to *raise* in remanded administrative proceedings these and other significant issues implicated by EPA's conceded confusion concerning section 7(a)(2) and the agency's extra-record effort to cure that problem in this Court. *Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002).

In sum, because EPA's decision was based on inconsistent views of section 7(a)(2), the case should have been

remanded for further administrative proceedings, and it was unnecessary for the court below to address the broader statutory construction issue. *See, e.g., Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 531-32 (1991) (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available."); *PDK Labs.* 362 F.3d at 799 (Roberts, J., concurring in the judgment) (applying the "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more").

II. IN MAKING TRANSFER DECISIONS, EPA MUST COMPLY WITH SECTION 7(a)(2)

Because EPA now concedes that the court of appeals was correct in ruling that the consultation and substantive requirements of section 7(a)(2) "go hand in hand," EPA Br. at 42, respondents and EPA agree that EPA must either comply with that provision in its entirety or not at all. *See id.* EPA's "clarified" answer is not at all. As the agency recognizes, the "logical" implication of its argument is that a transfer to a State could be *certain* to lead to extinction of one or more federally protected species, and yet neither the procedural nor substantive safeguards of section 7(a)(2) would ever come into play. EPA Br. at 14, 42, 47. Here, for example, although the transfer could, without further safeguards, prove "devastating" to survival of the few remaining Southwestern willow flycatchers, J.A. 39, or lead to the "severe decline" of endangered plants, *id.* at 49, petitioners' position is that the agencies need not consult about such dire impacts or do anything to prevent them even if simple solutions are at hand.

This is not a "logical" or even a plausible reading of section 7(a)(2). EPA Br. at 47. To the contrary, adopting petitioners' approach would require the Court to engage in "interpretive acrobatics," *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999), and cast aside both plain statutory language and the "institutionalized caution" that Congress intended when federal agencies take actions that affect listed species. *Hill*, 437 U.S. at 194.

A. Compliance With Section 7(a)(2) Is Required By The Plain Language Of Section 7(a)(2), This Court's Ruling In *Hill*, And Congress's Subsequent Ratification Of That Ruling

In view of the "text and structure" of section 7, *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 910 (2006), *Hill*'s reading of that provision, and Congress's subsequent creation of the Endangered Species Committee to address conflicts, petitioners' contention that the ESA has no bearing on NPDES transfer decisions is simply untenable.[11]

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[11] Since "traditional tools of statutory construction" establish that EPA must comply with section 7(a)(2), there is no need for the Court to determine whether the unusual circumstances of this case warrant any deference to the agencies' inconsistent approach to the provision. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). In any event, even if it were appropriate to consider the extra-record letters, those documents would be entitled to little if any deference. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (amount of deference based on "the degree of the agency's care, its consistency, formality," and related factors); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (denying *Chevron* deference to agency opinion letter).

1. Plain Language Of Section 7(a)(2)

While EPA asserts that section 7(a)(2) does not "unambiguously" apply, EPA Br. at 20, petitioners largely ignore the provision's plain language, which fits this case perfectly. Section 7(a)(2) provides, in pertinent part, that:

> *[e]ach federal agency shall*, in consultation with and with the assistance of the Secretary, insure that *any action authorized, funded, or carried out by such agency* [] is not likely to jeopardize the continued existence of any endangered species or threatened species or *result in* the destruction or adverse modification of [critical] habitat of such species. . . .

16 U.S.C. § 1536(a)(2) (emphasis added).

EPA is a "federal agency" and its self-described decision "*authorizing* Arizona to implement the NPDES program" surely falls within the "*any action authorized* . . . by such agency" language. *See Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind' ") (internal citation omitted); Webster's New World Dictionary (1990) ("authorize" means "to give official approval to" and "to give power or authority to"); *see also Bennett*, 520 U.S. at 164-65 (phrase "any person may commence a civil suit" in the ESA's citizen suit provision is "an authorization of remarkable breadth" that should be taken "at face value").

Accordingly, if section 7(a)(2) is interpreted in accordance with its ordinary meaning, the provision "requires federal agencies to ensure that *none of their activities* . . . will jeopardize the continued existence of endangered species 'or result in the destruction or modification' " of

critical habitat. *Sweet Home*, 515 U.S. at 692 (emphasis added; internal citation omitted). In addition, because the Arizona program is receiving substantial federal funds and, indeed, the transfer would likely not have even occurred in the absence of such funding, *see* J.A. 200-01, the plain terms of section 7(a)(2) apply for that reason as well. *See also* 50 C.F.R. § 402.02 (defining "[a]ction" for purposes of section 7 as "all activities or programs of any kind *authorized, funded*, or carried out, *in whole or in part*, by Federal agencies") (emphasis added).[12]

2. Statutory Context

The "specific context in which that language [of section 7(a)(2)] is used," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), makes even clearer that section 7(a)(2) means what it says, because *another* subsection contains the very limitation petitioners are asking this Court to read *into* section 7(a)(2). Thus, section 7(a)(1) of the statute separately provides that

> federal agencies shall, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this

[12] That petitioners' position distorts the statutory language is also illustrated by EPA's assertion that, "by its own terms, Section 7(a)(2) directs agencies to 'insure' only that their *own* actions are not likely to be the cause of jeopardy." EPA Br. at 27 n.8 (emphasis in original). That approach reads federally "authorized" and "funded" activities out of the provision, and also overlooks the fact that section 7 expressly refers to federal actions involving a "permit or license applicant." 16 U.S.C. § 1536(b)(1)(B); *see also* NAHB App. 75 (explaining that EPA has "long considered a determination to approve or deny a State" NPDES transfer request to be a "license" decision that is the product of an "adjudication").

> chapter by *carrying out programs for the conservation* of endangered species and threatened species.

16 U.S.C. § 1536(a)(1) (emphasis added).

Hence, section 7(a)(1) imposes an *affirmative* obligation on federal agencies to implement "programs for the *conservation*" – *i.e.*, recovery, *see* 16 U.S.C. § 1532(3) – of listed species, but *that* obligation is expressly limited to agencies' use of their *own* "authorities." In contrast, the section 7(a)(2) *prohibitions* on jeopardy and critical habitat destruction apply to "*any* . . . action authorized, funded, or carried out" by an agency. In other words, section 7(a)(1) creates a more far-reaching "conservation" duty but does so with regard to a narrower range of agency conduct.

When these subsections are viewed together, petitioners' contention that section 7(a)(2) is implicated only by "federal agencies' exercise of existing discretionary authority," EPA Br. at 15, runs roughshod over well-entrenched rules of statutory construction. First, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citation omitted) (affording statutory phrase its broad plain language meaning because a "succeeding subsection" had the same limitation the Court was being asked to read into the provision at issue; "[h]ad Congress intended to restrict" the provision in the same manner, it "presumably would have done so expressly as it did in the immediately following subsection"). Therefore, the short answer to petitioners' overarching contention that section 7(a)(2) should, in effect, be judicially rewritten to say that agencies need

only "utilize their authorities" to avoid jeopardy or critical habitat destruction, *see* EPA Br. at 15, is that Congress knew how to, but simply "did not write the statute that way." *Russello*, 464 U.S. at 23.[13]

By arguing that the prohibitions in section 7(a)(2) apply only to an agency's use of its "existing authority," EPA Br. at 15, rather than "any [agency] action authorized, funded, or carried out," as Congress mandated, petitioners' approach also contravenes the "'cardinal principle of statutory construction . . . [that] [i]t is [the Court's] duty to give effect, if possible, to every clause and word of a statute. . . .'" *Bennett*, 520 U.S. at 173 (internal citation omitted). This is because the section 7(a)(1) duty to "conserve" listed species necessarily *subsumes* the substantive prohibitions embodied in section 7(a)(2), *i.e.*, an agency cannot "conserve" a listed species while *also* causing its extinction. *See Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441-42 (5th Cir. 2001)

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[13] Petitioners assert that legislative history counsels in favor of inserting into section 7(a)(2) the "utilize their authorities" limitation that Congress omitted. EPA Br. at 15. Even if the Court were free to "read[] words or elements into [section 7(a)(2)] that do not appear on its face," *Bates v. United States*, 522 U.S. 23, 29 (1997), the legislative history actually reflects, as the decision below explains, that the broad scope of the jeopardy prohibition "was, as one would expect, deliberate." NAHB App. 34. Thus, Congress specifically intended to impose a "*further* require[ment]" on agency "action[s]" that goes beyond agencies' duty to "*use their authorities* in order to carry out programs" for the recovery of endangered species. 1973 House Report, ESA Leg. Hist. at 153 (emphasis added); *see also* 51 Fed. Reg. 19,926, 19,934 (FWS explanation that section 7(a)(1) "authorize[s] Federal agencies to factor endangered species conservation *into their planning processes*," and that "[i]n contrast, section 7(a)(2) *contains the mandatory 'jeopardy' standard*" and the "ultimate barrier past which *Federal actions may not proceed*" without an exemption from the Endangered Species Committee) (emphasis added).

("'[c]onservation' is a much broader concept than mere survival"). As a consequence, unless section 7(a)(2) is read to apply to "any [federal] action authorized, funded, or carried out" – as Congress said – the provision is mere "surplusage." *Sweet Home*, 515 U.S. at 698 ("unless the statutory term 'harm' [in the ESA] encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define 'take'").

3. *TVA v. Hill*

While petitioners assert that *Hill* "had no occasion to address the question presented here," EPA Br. at 16, the federal agency in *Hill* advanced essentially the same arguments being made by EPA, albeit in a different factual context, and the Court's reasons for rejecting those arguments apply with full force here.

In *Hill*, the agency argued that the section 7 jeopardy prohibition did not apply to a dam that had already cost "more than $ 100 million dollars" in public funds, was "near completion" when the ESA was enacted, 437 U.S. at 172, 174, 184, and for which Congress had intentionally "continued appropriations . . . with full awareness of the [endangered species] problem" posed by the action. *Id.* at 166. Indeed, Congress had specifically appropriated funds "for completion" of the dam and "relocation of the snail darter," the endangered species at issue. *Id.* at 171.

In that factual context, TVA argued that the phrase "actions authorized, funded, or carried out" should not be afforded its plain meaning but, rather, should be limited to only those actions "with respect to which the agency *has reasonable decision-making alternatives before it*." Pet. Br

at 26, *Tennessee Valley Authority v. Hill*, No. 76-1701 (filed Jan. 26, 1978) ("TVA Br.") (emphasis added); *see also id.* ("the 'actions' referred to are not all the actions that an agency can ever take, but rather actions that the agency *is deciding whether* to authorize, to fund, or to carry out") (emphasis added). Therefore, TVA urged the Court to reject an "over-literal construction" of section 7. *Id.* at 29, 39.[14]

While the dissent endorsed the view that the jeopardy prohibition should apply only to actions an "agency is *deciding whether* to authorize, to fund, or to carry out," 437 U.S. at 205 (Powell, J.) (emphasis in original), Chief Justice Burger's majority opinion held that this reading of the statute was contrary to the "ordinary meaning of [the] plain language," which the Court construed as "command[ing] federal agencies" not to take actions that in fact result in jeopardy to species or destruction of critical habitat. *Id.* at 173; *see also id.* at 188 ("[i]n fact, there are no exemptions in the [jeopardy prohibition] for federal agencies"). The Court also found this "ordinary meaning" consistent with the legislative history, particularly the fact

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[14] EPA's asserted distinction between this case and *Hill* – that *Hill* dealt with "agency policy judgments concerning the appropriate exercise of *discretionary* authority," EPA Br. at 16 (emphasis in original) – misstates both cases. In making NPDES transfer decisions, EPA *has* "discretionary authority" under the CWA, particularly with regard to wildlife-related impacts. *See supra* at 8-9. Moreover, the government's position in *Hill* was that TVA did *not* have "decision-making alternatives" because of Congress's "determination that this project should be completed" and the dam was nearly complete. TVA Br. at 29, 36. In that connection, any notion that TVA had some inherent "discretion" to refuse to spend funds that Congress had appropriated for completion of the dam is mistaken. *See Train v. New York City*, 420 U.S. 35, 43-45 (1975) (federal agencies lack discretion to avoid spending appropriated funds on policy grounds).

that the bills crafted by Congress were designed to both "*prohibit* [a] federal agency from taking action which does jeopardize the status of endangered species" and "furthermore," to direct each agency to "utilize [its] authorities for carrying out programs" for the conservation of listed species. *Hill*, 437 U.S. at 179-80 (emphasis in original; internal quotation omitted). Accordingly, the Court's ruling confirms that it has been clear from the beginning of the Act that the jeopardy prohibition applies, as the plain language provides, to all "action[s]" authorized, funded, or carried out by an agency and *not* simply to agencies' decisions on how to use their own "authorities."

Indeed, the Court further explained that the ESA's predecessor statutes "qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only 'insofar as is practicable and consistent with the[ir] primary purposes,'" *Hill*, 437 U.S. at 181 (internal citation omitted), and that it was "very significant" that, as enacted, the ESA "carefully omitted all of the[se] reservations" and deleted "all phrases which might have qualified an agency's responsibilities" to avoid actions that result in extinction. *Id.* at 182. Accordingly, the Court ruled that Congress's decision to adopt "stringent, mandatory" language, *id.* at 183, reflected "an explicit congressional design to require agencies to afford first priority to the declared national policy of saving endangered species," and that the "pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give *endangered species priority over the 'primary missions' of federal agencies.*" *Id.* at 185 (emphasis added). *Hill*, therefore, clearly stands for the proposition that agencies cannot escape the section 7(a)(2

prohibitions merely by arguing that Congress assigned them conflicting responsibilities. *See also id.* at 184 ("'[T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*'") (emphasis in original) (quoting 119 Cong. Rec. 42913 (1973) (Rep. Dingell)).

4. Congress's Ratification Of *Hill* And Creation Of The Endangered Species Committee To Resolve Conflicts Between Section 7(a)(2) And Other Statutory Duties

In the 1978 amendments, Congress took two steps that are also fatal to petitioners' position. First, Congress ratified *Hill's* plain language ruling regarding the scope of the section 7 prohibition on jeopardy and destruction of critical habitat. Second, Congress created the Endangered Species Committee for the precise purpose of resolving the kind of conflict that petitioners (erroneously) insist exists between section 7(a)(2) and the CWA transfer provision.

As explained in the 1978 House Report, Congress understood the ruling in *Hill* as "indicat[ing] that the pointed omission of any type of qualifying language in [section 7 of] the statute revealed congressional intent to give the continued existence of endangered species priority over the primary missions of Federal agencies." 1978 House Report, ESA Leg. Hist. at 734. The Report further explained that Congress accepted this construction of section 7 as "requir[ing] all federal agencies to consult with the Department of the Interior . . . when *any* of their actions *may* affect endangered species," and that "whether a particular activity violates Section 7 depends on the *type and degree of impact that the activity will have* on the species or its habitat." *Id.* at 735 (emphasis added). Accordingly,

rather than respond to *Hill* by qualifying the jeopardy prohibition with the kind of limiting language in section 7(a)(1), Congress reenacted the prohibition without any such restriction. *See* Pub. L. 95-632, 92 Stat. 3753, ESA Leg. Hist. at 648.

Instead, to "introduce some flexibility into the Act," Congress enacted "a procedure through which Federal agencies *may be considered for an exemption from the Act's mandate* that they not jeopardize the continued existence" of listed species. 1978 House Report, ESA Leg. Hist. at 727 (emphasis added). Accordingly, the "basic premise" of Congress's response to *Hill* was that "the integrity of the interagency consultation process designated under section 7 of the Act be preserved," and that only "in those instances where the consultation process has been exhausted *and a conflict still exists,*" the Endangered Species Committee shall consider granting an exemption for a federal action. 1982 Senate Report, NAHB App. 532 (emphasis added).

Contrary to petitioners' assertion that the exemption process is somehow foreclosed when there are "legal constraints on agency power to protect species," EPA Br. at 29, Congress specifically anticipated that the Committee would address conflicts between section 7(a)(2) and the agency's "jurisdiction" to protect species under its own authorities. *See* 1978 House Report, ESA Leg. Hist. at 746 (the Committee "should focus on a wider variety of alternatives [than the consultation process]. *Their search should not be limited to original project alternatives or the acting agency's jurisdiction.*") (emphasis added). Further, in granting an exemption, the Committee – which, once again, is composed of high-ranking federal officials as well as a representative of each "affected State" – is authorized

to establish such "mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action" on listed species irrespective of whether such measures are within the action agency's statutory authority. 16 U.S.C. §§ 1536(e)(1)(3), (h)(1)(B).

Accordingly, this is the paradigmatic case in which a "'judicial interpretation[] settled the meaning of an existing statutory provision,'" and Congress then manifested its "'intent to incorporate'" that interpretation into the statutory scheme. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 1513 (2006) (internal citation omitted). Moreover, application of that principle is "particularly apt here," *id.*, because Congress created a specific process for addressing any irreconcilable conflicts between section 7(a)(2) and agency actions under other statutory schemes.

B. Petitioners' Remaining Arguments Are Baseless

1. Petitioners argue that section 7(a)(2) does not "impliedly repeal[]" the CWA's transfer provision. EPA Br. at 19. As EPA acknowledges, however, "'[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Id.* at 20 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) (courts should adopt interpretations that "give effect to each" law "while preserving their sense and purpose").

Petitioners' approach makes no genuine effort to "give effect to each" of the laws at issue. To the contrary, particularly as now "clarified," EPA's position is that the Court should hold that, although the plain terms of section 7(a)(2) surely apply to EPA's "final action[s] authorizing" State NPDES programs, NAHB App. 76, EPA may nevertheless disregard section 7(a)(2)'s consultation requirement *and* substantive prohibitions. That argument obliterates, rather than gives effect to, the language and purpose of section 7(a)(2).

There is no legal or practical justification for decimating section 7(a)(2) in this manner. Rather, the most straightforward way of giving effect to *both* the ESA and CWA – which EPA and FWS have previously recognized as "compatible and complementary" statutory schemes, NAHB App. 274, with "consistent" wildlife "protection goals," *id.* at 84 – is to do what the agencies *successfully* did for many years before their reversal of position: use the section 7 consultation process to devise reasonable methods for ameliorating post-transfer impacts on federally listed species of concern to Service biologists. Petitioners proffer no reason why this common-sense approach, which has already furthered the objectives of both statutes, cannot also work here or with regard to any other applications.[15]

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[15] Indeed, in *Hill* the Court observed that Congress "foresaw that § 7 would, on occasion, require agencies to alter" actions unrelated to environmental protection objectives. *Hill*, 437 U.S. at 186-87 (citing as an example "Air Force practice bombing" activities that were affecting whooping cranes). Accordingly, it makes no sense for EPA to contend that it must disregard the provision when acting under a "complementary" conservation statute. NAHB App. 274; *see also* 16 U.S.C. § 1531(c) (declaring the "policy of Congress that Federal agencies shall cooperate

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However, even if FWS were ultimately to conclude that transfer to Arizona (or another State) would in fact result in jeopardy or destruction of critical habitat and that EPA cannot remedy the problem consistent with its CWA duties that would *still* not necessitate an "implied repeal" analysis. Thus, *Congress* itself has established the legal mechanism for "giving effect" to both statutes under such circumstances by providing that EPA and/or the State may invoke the Endangered Species Committee exemption process.[16]

2. Also misplaced is petitioners' reliance on a FWS regulation that provides that "section 7 . . . appl[ies] to all actions in which there is *discretionary Federal involvement* or control." 50 C.F.R. § 402.03 (emphasis added). The simple answer is that EPA repeatedly stated in the court below that it did *not* rely on that regulation in making its decision. *See supra* at n.8; *see also* NAHB App. 43 n.19. EPA cannot now contend that the Court should sustain the transfer decision on the basis of a regulation that the agency conceded had nothing to do with its action under review. *See Chenery*, 332 U.S. at 196 (courts "must judge

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with State and local agencies to resolve water resource issues *in concert with conservation of endangered species*") (emphasis added).

[16] Although the ESA and CWA can and should be harmonized, even if they were found to conflict unavoidably, the correct result would not be for the Court simply to disregard section 7(a)(2), as petitioners insist. Rather, since the "text of Section 7(a)(2) unambiguously" *does* apply in this context, EPA Br. at 20, it should be given effect as the "latter act" passed by Congress. *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). By the same token, there is nothing to prevent Congress from specifically excluding any agency action from ESA requirements, as Congress has done on several occasions. *See, e.g., Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (applying rider exempting telescope project from section 7(a)(2)).

the propriety of [agency] action solely by the grounds invoked by the agency").[17]

But even if the Court were to consider this new rationale, the regulation has no bearing on this case. The regulation cannot "be applied to alter the clearly expressed intent of Congress" in section 7(a)(2), *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986) and, in any event, EPA *does* have "discretionary . . . involvement or control," 50 C.F.R. § 402.03, particularly with regard to the consideration of wildlife impacts, both before and after NPDES transfer decisions are made. *See supra* at 8-9. Indeed, this Court has observed that EPA has "broad authority to oversee state [NPDES] programs," *Arkansas*, 503 U.S. at 105, and EPA itself has recognized that its "authority to disapprove an inadequate state program based upon [its] informed judgment *necessarily demonstrates discretionary EPA control*." EPA Fifth Cir. Br. at 34 (emphasis added). Even further, EPA is required to solicit and consider public comment on transfer applications and thus, as the agency has pointed out, "[i]f EPA were simply acting in a ministerial fashion, such weighing of the merits of public comments would not be necessary." *Id.*

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[17] That the intervenors cited the regulation "in arguing that . . . Section 7(a)(2) was inapplicable" to the transfer decision, EPA Br. at 38 n.13, is of no legal moment because it is a bedrock principle of administrative law that an "agency's action must be upheld, if at all, on the basis *articulated by the agency itself*" at that time of its decision. *State Farm*, 463 U.S at 50 (emphasis added). Moreover, even NAHB suggests that it *was* appropriate for EPA and FWS to have consulted with regard to any "water-quality related impacts on listed species or critical habitat." NAHB Br. at 48.

Certainly, the mere fact that the transfer provision has the word "shall" in it does not mean that EPA lacks discretion in making decisions. *See, e.g., Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (statute providing that an agency "shall" prevent unnecessary or undue degradation of certain lands and resources "is mandatory as to the object to be achieved, but it leaves [the agency] with a great deal of discretion in deciding how to achieve it"). Accordingly, when EPA loosely characterizes the transfer provision as a Congressional "mandat[e]," EPA Br. at 25, it is apparently arguing that whenever Congress circumscribes an agency's exercise of discretion by delineating factors for an agency to consider in making a decision (as Congress generally does), but does not expressly include consideration of endangered species impacts, then the section 7(a)(2) requirements cease to apply. But that approach, once again, eviscerates section 7(a)(2) in a way that cannot possibly be supported by its plain language; indeed, it resurrects the very construction of section 7 that was rejected in *Hill*, *i.e.*, that federal agencies need only avoid jeopardizing species to the extent "consistent with the[ir] primary purposes." 437 U.S. at 181 (internal citation omitted).

3. Petitioners argue that *Department of Transportation v. Public Citizen*, *supra*, supports the proposition that "[s]ection 7(a)(2) applies only to conduct that is attributable to the federal agency itself" and that, if species go extinct as a result of EPA's transfer decision, that is the fault of Congress, not the agency. EPA Br. at 14. That, of course, is only a different way of saying that EPA's authorization of the Arizona program is not the kind of agency action that triggers section 7(a)(2) – a position that has no support in the language of the statute and that

recapitulates the central argument rejected in *Hill*, in which TVA likewise argued that it was Congress's decision to fund the dam, and hence the ESA should be ignored. 437 U.S. at 171.

In any case, the reasoning in *Public Citizen* supports the proposition that EPA is required to comply with the substantive mandate of section 7(a)(2), including by consulting with FWS on all of the *actual* effects of the transfer decision. *Public Citizen* concerned whether the Federal Motor Carrier Safety Administration ("FMCSA") had complied with NEPA, which, as explained by the Court, "imposes *only procedural requirements* on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." 541 U.S. at 756-57 (emphasis added). FMCSA had prepared an Environmental Assessment evaluating the environmental effects of its regulations establishing safety standards for trucks. *Id.* at 760-62. Accordingly, the only issue was whether the agency's NEPA analysis was deficient because it failed to address adequately the impacts associated with an "action of the President" – who is not required to comply with NEPA – to lift a moratorium on Mexican trucks entering the United States. *Id.* at 769.

Focusing on the language and purpose of NEPA, the Court held that where an agency "has no authority" to take environmental impacts into account in making a particular decision, then it "serve[s] 'no purpose' in light of NEPA's regulatory scheme as a whole" to require an agency to prepare a NEPA document thoroughly analyzing those impacts. *Id.* at 767 (internal citation omitted). The Court reasoned that in view of NEPA's purely procedural requirements, impacts that could have no bearing on the

agency's decision were not "legally relevant" to the NEPA analysis. *Id.* at 770.

Here, however, petitioners are advancing a far more extreme position with respect to a fundamentally different statutory obligation. Thus, although section 7(a)(2) prohibits "any" agency action that is likely to jeopardize the continued existence of a species, and "contains a *flat ban* on the destruction of critical habitats," *Weinberger v. Romero-Barcelo*, 456 U.S. at 314 (emphasis added), petitioners contend that EPA's authorizing action is not subject to section 7(a)(2) *at all*. Moreover, as *Hill* itself noted, NEPA decisions are "completely inapposite" in the ESA context because NEPA "imposes a procedural requirement on agencies," but the "ESA is substantive in effect, designed to *prevent* the loss of any endangered species. . . ." *Hill*, 437 U.S. at 188 n.34 (emphasis in original).

Accordingly, as the Court further explained in *Hill*, while "it would make sense to hold NEPA inapplicable" in situations where an agency may not actually take any action based on its NEPA analysis, "[s]ection 7, on the other hand, compels agencies not only to *consider* the effect" of their actions on endangered species, "but to take such actions as are necessary to *insure* that species are not extirpated as a result of federal activities." *Id.* (emphasis in original); *see also* 1978 House Report, ESA Leg. Hist. at 743 ("each Federal agency is required to insure that any action authorized, funded, or carried out by it *does not result in* species or habitat degradation unless the action has been exempted" by the Endangered Species Committee) (emphasis added). Thus, to apply *Public Citizen* in this context would be to force a square precedential peg into a round statutory hole.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it was based on the inconsistency in EPA's approach to section 7(a)(2) and the case should be remanded for further administrative proceedings.

Respectfully submitted,

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No. 06-549

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit in this case held that Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress. That holding is incorrect, because Section 7(a)(2) does not apply where the legal cause of any impacts on listed species is a mandate or constraint enacted by Congress, rather than discretionary action of an agency. See *Department of Transportation* v. *Public Citizen*, 541 U.S. 752, 769-770 (2004); Pet. 10-13. As both the panel majority and the six judges who dissented from denial of rehearing en banc recognized, the Ninth Circuit's holding conflicts with decisions of two other courts of appeals. Pet. App. 44a-45a, 46a-47a; see *id.* at 79a-81a (Kozinski, J., dissenting from denial of rehearing en banc). The holding also is of government-wide significance, because Section 7(a)(2) applies to all federal agencies. Review by this Court therefore is warranted.

A. The Question Presented Is Properly Before This Court

Respondents contend (Br. in Opp. 15-18) that the question on which the government seeks review—*i.e.*, whether Section 7(a)(2) of the ESA overrides statutory mandates or constraints imposed by other Acts of Congress—is not properly presented here because the relevant agencies' understanding of their legal obligations has changed during the course of the litigation. That is incorrect.

The biological opinion (BiOp) issued by the Fish and Wildlife Service (FWS) concluded that any harm to listed species that might occur after National Pollutant Discharge Elimination System (NPDES) permitting authority is transferred to the State of Arizona would not be *caused* by the administrative decision of the Environmental Protection Agency (EPA) to approve the transfer in accordance with the requirements of the Clean Water Act (CWA). Rather, the agencies' position was that any loss of protection to listed species resulting from the transfer of NPDES permitting authority to the State is properly attributable to the actions of *Congress* in (1) mandating such a transfer under Section 402(b) of the CWA if the specified criteria are satisfied, and (2) making Section 7(a)(2) of the ESA inapplicable to the actions of a state agency, such as the Arizona agency that would administer the NPDES program after the transfer at issue here. See Pet. 5, 11-12. The government has adhered to that position throughout this litigation.

The court of appeals recognized that "a negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result." Pet. App. 29a. The court held that the requisite control was present here because, in its view, Section 7 of the ESA itself provides an "affirmative grant of authority to attend to protection of listed species," even when particular protective measures would otherwise be forbidden by federal law. *Id.* at 34a; see *id.* at 38a-

39a. The court concluded on that basis that "EPA's transfer decision will cause whatever harm may flow from" the transfer of permitting authority to state officials. *Id.* at 48a. Because the court of appeals rejected the government's causation argument *on the merits*, that issue is properly before this Court.

As the petition for a writ of certiorari explains (at 21-26), EPA and FWS did not take the further position during the administrative proceedings that, because the consultation requirement imposed by Section 7(a)(2) of the ESA applies only to agency conduct that is subject to Section 7(a)(2)'s substantive no-jeopardy mandate, the causation analysis set forth in the FWS BiOp also meant that EPA was not required to consult about the transfer of NPDES permitting authority. The fact that EPA and FWS did not take that *further* step at an earlier stage of the case, however, presents no obstacle to this Court's review of the no-jeopardy issue the agencies *did* decide, on which the court of appeals rejected the agencies' conclusion. Moreover, because EPA *did* consult with FWS concerning the transfer decision, it was unnecessary for the court of appeals even to decide whether consultation was legally required. See Pet. App. 43a n.19. If the FWS's causation analysis is otherwise sound, EPA's now-superseded statements that it viewed itself as obligated to consult in the first instance do not cast doubt either on the legality of the NPDES transfer decision or on the suitability of the case for review by this Court. See Pet. 25-26.

B. The Court Of Appeals' Decision Is Erroneous

1. The CWA states that EPA "shall approve" a State's transfer application if specified criteria are met, see 33 U.S.C. 1342(b), and it is undisputed that Arizona's application satisfied those prerequisites, see Pet. App. 31a n.11. Respondents contend (Br. in Opp. 25) that the CWA and ESA may be harmonized by holding that EPA must *both* "apply the CWA criteria" *and* "insure" against jeopardy to listed species. But if

EPA denies (or places additional conditions upon) a state transfer application that satisfies the specified requirements of 33 U.S.C. 1342(b)(1)-(9), the agency is not "apply[ing]" the CWA at all, but rather is countermanding the express CWA directive that such applications "shall" be approved. See Pet. 9-10. In this circumstance, the CWA and EPA are properly reconciled by holding that EPA's approval of the state application pursuant to that statutory mandate does not "jeopardize" the listed species because it is not the legal cause of any harm to the species that may occur under the state permitting regime. See Pet. 10-13.

As the certiorari petition explains (at 12-13), the causation analysis in the FWS BiOp is strongly supported by this Court's subsequent decision in *Public Citizen*, which recognized that a federal agency "cannot be considered a legally relevant 'cause'" of harm that the agency lacks statutory authority to prevent. 541 U.S. at 770. Respondents contend (Br. in Opp. 28-29) that *Public Citizen* is irrelevant here because that case involved a statute (the National Environmental Policy Act (NEPA)) that imposes solely procedural requirements upon federal agencies. Respondents are correct that the substantive no-jeopardy mandate imposed by Section 7(a)(2) of the ESA has no analog in NEPA. Respondents do not explain, however, why that distinction between the two statutes bears on the question whether a transfer decision required by the CWA is properly regarded as the legal cause of any harm to listed species that may result from activities authorized by state NPDES permits after the transfer occurs. Indeed, the court of appeals concluded that, "[g]iven the similarity in the applicable regulations" under NEPA and the ESA, *Public Citizen* supplied the appropriate causation analysis for the ESA as well. Pet. App. 30a.

2. The certiorari petition explains (at 14-15) that, in the ESA as originally enacted in 1973, Section 7 directed that federal agencies not "utilize their authorities" in ways that would jeopardize listed species. Respondents do not dispute that,

under that language, Section 7's no-jeopardy mandate would not have required or authorized federal agencies to breach directives contained in other Acts of Congress. See Br. in Opp. 26. Respondents' position therefore necessarily depends on the premise that the 1978 amendments to the ESA significantly expanded the scope of the no-jeopardy mandate in a way that trumped competing statutory regimes. That premise is implausible in light of the sequence of events that preceded the 1978 amendments (see Pet. 16-17), and respondents identify no basis for concluding that the 1978 Congress intended that result.

As respondents observe (Br. in Opp. 26-27), if Section 7(a)(2) unambiguously superseded mandatory duties imposed by other federal statutes, the absence of pertinent legislative history would not be dispositive. However, the text of Section 7(a)(2) in its current form is at least ambiguous with respect to the question presented here, because the term "jeopardize" may reasonably be construed to apply only to decisions that are properly attributed to the relevant federal agency under the causation principles discussed above. See Pet. 13. In addition, the 1978 legislative history is not, as respondents suggest (see Br. in Opp. 27), silent on the question whether the amendments enacted that year were intended to expand the coverage of the no-jeopardy mandate. Rather, the Conference Report accompanying those amendments stated that the new subsection 7(a) "essentially restates section 7 of existing law." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Thus, under Section 7(a)(2) in its current form, as under prior law, the obligation of an agency not to jeopardize a listed species is simply a particular (albeit mandatory) aspect of the more generalized provision for agencies to "utilize their authorities" in furtherance of the Act's purposes. See Pet. 16.[1]

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[1] Respondents contend (Br. in Opp. 27 & n.13) that the addition of an exemption procedure to Section 7 in the 1978 ESA amendments (see Pet. 16-17) supports their argument that the requirements of Section 7(a)(2) apply even

3. Respondents' reliance (Br. in Opp. 3-4, 13, 24-25) on *TVA* v. *Hill*, 437 U.S. 153 (1978), is misplaced. The Court in *Hill* simply found that continuing congressional appropriations for a dam that had been found to jeopardize an endangered species of fish did not constitute an implied repeal of Section 7 of the ESA. The Court emphasized that the appropriations for the dam "represented relatively minor components of the lump-sum amounts for the *entire* TVA budget." *Id.* at 189. The Court further explained that "[t]he Appropriations Acts did not themselves identify the projects for which the sums had been appropriated." *Id.* at 189 n.35.

Because the relevant Appropriations Acts *authorized* but did not *require* the Tennessee Valley Authority to put the Tellico Dam into operation, this Court had no occasion to consider the application of the ESA's no-jeopardy mandate to conduct required by another Act of Congress. The Court in *Hill* did not suggest that Section 7 of the ESA superseded an express statutory directive like that contained in Section 402(b) of the CWA. Indeed, any such holding would have been implausible under the version of Section 7 that was in effect when *Hill* was decided, which unambiguously identified the avoidance of jeopardy to listed species as simply one means by which federal

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where an agency is acting pursuant to an express statutory directive. The statutory language makes clear, however, that the exemption mechanism was not intended to address such situations. The ESA requires, *inter alia*, that an applicant for an exemption show that it has exhausted the consultation process and has "made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section." 16 U.S.C. 1536(g)(3)(A)(i). That requirement could not sensibly be applied to circumstances in which an agency is required by statute to take the proposed action. Thus, the statutory language confirms that subsection 7(g), like the rest of Section 7, was intended to apply only to the extent agencies can "utilize their authorities" to modify proposed actions or adopt alternatives thereto.

agencies were directed to "utilize their authorities in furtherance of the purposes of" the ESA. See Pet. 14; *Hill*, 437 U.S. at 160.[2]

C. The Decision Below Conflicts With Decisions Of Two Other Courts Of Appeals

As the certiorari petition explains (at 19-20), the Ninth Circuit's decision in this case conflicts with the rulings in *Platte River Whooping Crane Critical Habitat Main. Trust* v. *FERC*, 962 F.2d 27 (D.C. Cir. 1992) (*Platte River*), and *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (5th Cir. 1998) (*American Forest*). Respondents contend (Br. in Opp. 18-22) that no direct conflict exists because the courts in *Platte River* and *American Forest* (1) did not specifically address the proper treatment of situations in which compliance with a statutory mandate would jeopardize a listed species, and (2) relied in part on the language of Section 7(a)(1) of the ESA, which directs federal agencies to "utilize their authorities" to effectuate the Act's purposes. 16 U.S.C. 1536(a)(1). Respondents' argument is incorrect. Indeed, the Ninth Circuit itself acknowledged the circuit conflict, stating that the courts in *Platte River* and *American Forest* had

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[2] As the certiorari petition explains (at 18), the court of appeals' decision in this case is inconsistent with 50 C.F.R. 402.03, which reflects the longstanding view of FWS and the National Marine Fisheries Service that Section 7 of the ESA does not supersede other legal constraints on agency discretion. Respondents suggest (Br. in Opp. 27-28) that Section 402.03 is irrelevant here because the government disclaimed reliance on that regulation in the court of appeals. The Ninth Circuit, however, did not treat the government's silence on this point as a reason for declining to address the meaning of the regulation. To the contrary, the court announced its construction of the regulation, which directly parallels the court's conclusion that Section 7(a)(2) of the ESA overrides mandatory directives in other statutes, and which is flatly inconsistent with that of the federal agencies that administer 50 C.F.R. 402.03 and are responsible for its promulgation. Pet. App. 39a-44a; see Pet. 18; Pet. App. 103a-116a. That holding concerning the meaning of the regulation is binding circuit precedent, and, like the statutory holding on which it is premised, should not be permitted to stand.

"conclud[ed] that section 7 does not itself authorize agencies to protect listed species even when it is their own action that is jeopardizing them." Pet. App. 44a; see *id.* at 44a-45a, 46a-47a; accord *id.* at 79a-81a (Kozinski, J., dissenting from denial of rehearing en banc).

The petitioner in *Platte River* relied on Section 7(a)(2) of the ESA, see 962 F.2d at 33, and the District of Columbia Circuit quoted that provision as well as Section 7(a)(1), see *id.* at 33-34. The court did not limit its holding to Section 7(a)(1), but rather stated broadly that "the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Id.* at 34. In finding this Court's decision in *Hill* to be inapposite, moreover, the court in *Platte River* did not distinguish between Section 7(a)(1) and Section 7(a)(2), but simply noted that the Court in *Hill* "did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA." *Ibid.*

The conflict with *American Forest* is particularly clear because that case involved the application of Section 7(a)(2) to the very category of agency action—EPA transfers of NPDES permitting authority under the CWA—that is at issue here. In *American Forest*, the Fifth Circuit specifically referred to Section 7(a)(2), see 137 F.3d at 298, 299, in broadly holding that "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction," *id.* at 299. For that reason, the court stated, "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized ' the CWA." *Ibid.* Here, by contrast, the clear holding of the court of appeals is that the ESA *can* be the source of extra-CWA prerequisites to the approval of a state NPDES application. See Pet. App. 34a, 38a-39a; see also *id.* at 87a n.2 (Berzon, J., concurring in denial of petition for rehearing en banc) (stating

that the ESA "*adds* one requirement to the list of considerations under the [CWA] permitting transfer provision").

D. This Case Presents A Question Of Substantial Legal And Practical Importance

As the certiorari petition explains (at 21), this case raises an issue of substantial legal and practical importance because Section 7(a)(2) applies to *all* federal agencies. Respondents contend (Br. in Opp. 23-24) that this Court's review is unwarranted because Congress can exempt particular categories of agency conduct from Section 7(a)(2)'s coverage. Of course, in the view of EPA and FWS, Congress already has done that by making the transfer of NPDES permitting authority to a State mandatory when the specified criteria are satisfied. More broadly, under respondents' rationale, this Court would never resolve questions of statutory interpretation because Congress always retains authority to correct lower courts' misunderstandings of federal legislation.

Respondents also suggest (Br. in Opp. 24 n.10) that the question presented is of limited practical importance because the court of appeals' holding applies by its terms only when a federal agency "engages in an affirmative action." Pet. App. 38a. Even with that limitation, however, the court's ruling encompasses a broad range of agency conduct. That is particularly so because the "affirmative action[s]" to which the Ninth Circuit's holding applies include not only ground-disturbing actions undertaken directly by federal personnel, but also *administrative* actions like the transfer of NPDES permitting authority at issue in this case from EPA to a state agency.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Solicitor General

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In The
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NATIONAL ASSOCIATION
OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF NEBRASKA, ALABAMA, ALASKA, COLORADO. IDAHO, MISSOURI, NEVADA, NEW MEXICO, NORTH DAKOTA, TENNESSEE, UTAH, AND WYOMING; AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE*

The *Amici Curiae* States of Nebraska *et al.* (the "*Amici* States"), through their respective Attorneys General, respectfully submit this brief pursuant to Sup. Ct. R. 37.4 in support of the petitioners.

INTEREST OF *AMICI CURIAE* STATES

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1972), represents a highly successful example of cooperative federalism in environmental protection. A core, indeed animating, element of the CWA's regulatory scheme is the National Pollutant Discharge Elimination System ("NPDES") which controls point source discharges of pollutants into navigable waters of the United States. Under CWA § 402, 33 U.S.C. § 1342, the NPDES program is administered by the Environmental Protection Agency ("EPA"), but the statute mandates that EPA approve a State's application to assume responsibility of the NPDES program if nine exclusive criteria are satisfied. *Id.* at (b)(1)-(9). Over the almost 35 years since the CWA's passage, all but five States have assumed that responsibility. U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System, State Program Status, (April 14, 2003) http://cfpub.epa.gov/npdes/statestats.cfm. The principal question presented here is whether the Endangered Species Act ("ESA") 16 U.S.C. §§ 1531-1544 (1973), impliedly amended or otherwise superseded the CWA by imposing a tenth condition precedent – compliance with the substantive requirements in ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) – to EPA's transfer of NPDES permitting authority to an applicant State.

The answer to that question is important to the *Amici* States for two fundamental reasons. *First*, they have a strong interest in securing and maintaining responsibility for the NPDES program on the terms Congress prescribed in the CWA. That 90 percent of the States have undertaken the statutory, administrative and fiscal burdens necessary to satisfy CWA § 402(b)'s requirements and implement the program reflects the States' strong commitment to protecting their individual interests, and the Nation's interest, in our rivers, streams and lakes. The majority panel's conclusion that EPA may withhold NPDES permitting authority from an otherwise qualified applicant based solely on the outcome of ESA § 7(a)(2) consultation threatens to preclude future transfers and undo prior transfers properly made pursuant to CWA § 402(b). *Second*, as explained in the *Amici* States' brief in support of EPA's petition for certiorari, the CWA is one of several federal environmental statutes that embody a comparable structure of cooperative federalism. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(w)(1)(a); Safe Drinking Water Act, 42 U.S.C. § 300(g)(2)(a); Resource Conservation and Recovery Act, 42 U.S.C. § 6947(a); Clean Air Act, 42 U.S.C. § 7410(k)(3). The majority's reasoning leads inexorably to the conclusion that ESA § 7(a)(2) impliedly amended or otherwise superseded those laws.

SUMMARY OF THE ARGUMENT

I. The biological opinion issued by the U.S. Fish and Wildlife Service ("Service" or "FWS") and adopted by EPA when approving Arizona's NPDES transfer application did not employ "inconsistent" reasoning. As the panel majority

itself recognized, a key rationale for the no-jeopardy finding was the agencies' conclusion that, *inter alia*, loss of possible benefits from ESA consultation upon transfer was not an "effect of the action" because that loss derived from the mandatory nature of the transfer obligation under CWA § 402(b). Although that legal conclusion could have also provided grounds for avoiding ESA § 7(a)(2) consultation in the first instance, the administrative record establishes that the agencies assumed a duty to consult and focused their legal analysis (and interagency debate) on whether EPA possessed any discretion to deny the Arizona application once CWA § 402(b)'s transfer criteria were satisfied. The agencies cannot be faulted for failing to consider whether consultation was required, when that became at most an academic concern upon issuance of a "no-jeopardy" biological opinion. The critical issue here is instead whether the basis, as articulated in the biological opinion, for its findings comports with the involved statutes.

Even were the "inconsistency" posited by the panel majority present, remand for purposes of resolving it is unnecessary. The majority devoted most of its opinion to rejecting the agencies' legal conclusion that EPA lacked authority to deny the transfer application once it found the CWA § 402(b) criteria met. Its analysis subsumed any question to which remand might be directed. This matter thus differs markedly from cases where a reviewing court improperly supplemented the record by deciding for the first time an issue never addressed by the agency below. The Service and EPA resolved in the negative the question whether the ESA expanded the latter's authority when making NPDES transfer determinations.

II. The majority panel's opinion "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute." *Defenders of Wildlife v. E.P.A.*, 450 F.3d 394, 398 (9th Cir. 2006) (Kozinski, J., dissenting) ("*Defenders II*"). The majority failed to respect Congress' clear intent that the States occupy the primary role of regulating water pollution and that the States' administration of the NPDES program supplant that of EPA when nine *exclusive* criteria set forth in CWA § 402(b) are satisfied. That statute's text, whether viewed in isolation or in context with the more general congressional development of federal water quality policy and CWA legislative history, "leaves no room for conditions ten, eleven, or whatever else [courts] may think Congress should have added." *Defenders II*, 450 F.3d at 402 (Kleinfeld, J., dissenting).

The central question here is whether the ESA impliedly altered CWA § 402(b). Under settled principles of statutory construction, it did not. Repeals by implication are strongly disfavored and can be found only through a clear and manifest expression of congressional intent. Nothing remotely suggesting such intent can be discerned from the ESA's original or current text. In particular, the panel majority's reliance on a 1978 amendment dividing subsection (a) of ESA § 7 into separate paragraphs was unfounded. Neither the amendment's text nor history provides grounds to view Congress' action as expanding the substantive reach of the original provision and granting federal agencies unqualified power to protect listed species in deragation of a competing congressional mandate. Even were there ambiguity on this point, the Service's construction of ESA § 7(a)(2)'s applicability in 50 C.F.R. § 402.03 would control under *Chevron* deference

standards. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

The court of appeals' understanding of ESA § 7(a)(2), if accepted, will have dramatic consequences for the State of Alaska, which is currently seeking NPDES program authority,[1] and for states like Idaho, which have not yet sought such authority. For these States, CWA § 402(b) would no longer set an exclusive standard for NPDES program approval. For the *forty-five* other States that already possess NPDES authority, the specter of consultation reinitiation under 50 C.F.R. § 402.16 would arise. In either instance, the long-standing and carefully-wrought statutory scheme embodied in the CWA would be materially disrupted and otherwise compliant state regulatory processes (and related investment) would be placed at risk.

ARGUMENT

I. ENGAGING IN ESA § 7(a)(2) CONSULTATION, EVEN IF UNNECESSARY, DID NOT RENDER ARBITRARY EPA'S POSITION CONCERNING ITS LACK OF DISCRETION TO SUPPLEMENT CWA § 402(b)'s CRITERIA, AND REMAND WOULD SERVE NO PURPOSE SINCE THE AGENCIES RESOLVED THE DISPOSITIVE LEGAL ISSUE.

In its Order granting the petitions, this Court requested the parties brief the following question:

[1] *See generally* Brief of *Amicus Curiae* State of Alaska in Support of Petitions for Writ of Certiorari.

> Whether the court of appeals correctly held that [EPA's] decision to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2); and, if so, whether the court of appeals should have remanded to [EPA] for further proceedings without ruling on the interpretation of Section 7(a)(2).

The *Amici* States submit that the panel majority erred in holding that perceived "inconsistencies" rendered EPA's decision arbitrary and capricious, but that, in any event, remand was not required and would have been fruitless.

The majority below correctly recognized that the biological opinion forming the basis of the challenge by petitioners below set out several reasons why EPA's CWA § 402(b) transfer determination did not carry any impacts properly characterized as "effects of the action" defined in 50 C.F.R. § 402.02. *Defenders of Wildlife v. E.P.A.*, 420 F.3d 946, 960-61 (9th Cir. 2005) ("*Defenders I*"). Principal among those reasons was the legal conclusion that "EPA ha[d] no authority to disapprove transfer applications because of an impact on listed species, section 7(a)(2) of the Endangered Species Act notwithstanding." *Id.* at 961. The majority devoted much of the remaining portion of the decision below to rejecting this conclusion on its merits. *Id.* at 962-71.

The panel majority, however, prefaced its discussion of ESA § 7(a)(2)'s scope with the holding that EPA's transfer determination was predicated on the mutually exclusive "propositions" that, while obligated to consult under

the ESA over the determination, the agency was "not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision." *Defenders I*, 420 F.3d at 961. It drew this inconsistency from its view that ESA § 7(a)(2)'s procedural and substantive duties are coterminous and that, as a consequence, once a particular agency activity is deemed an "action" for consultation purposes, any impacts from it must be deemed "effects of the action." *Id.*

The inconsistency perceived by the majority did not constitute a basis for invalidating the transfer determination. That, in retrospect, EPA could have refused to consult with the Service at all – since the transfer did not embody the exercise of agency discretion once Arizona satisfied the CWA § 402(b) criteria – made no difference to the ultimate result: the issuance of a biological opinion containing a no-jeopardy finding. The majority simply introduced an "inconsistency" of its "own making" into the case – as Judge Kozinski observed in his dissent from denial of the request for rehearing *en banc*. *Defenders II*, 450 F.3d at 396. The acuity of Judge Kozinksi's observation can be seen in the internal debate at lower EPA and Service echelons recorded in the "elevation" memorandum. NAHB Pet. App. at 562-82. Their debate centered on the problem of whether the EPA had ESA-based authority to condition approval of Arizona's program on terms accommodating the Service's concern over a loss of the "federal nexus" needed to trigger the ESA § 7 consultation process. NAHB Pet. App. at 563-64. The Service eventually acceded in the biological opinion to EPA's position – an accession that rendered academic the arguably antecedent question

whether consultation had been required in the first instance.[2]

The two agencies thus can hardly be faulted for not considering a particular issue of statutory construction whose resolution made no difference to them under the circumstances. Although this decision-making approach failed to answer a question that the majority deemed essential, the deferential review standard under 5 U.S.C. § 706(2)(a) empowers the courts only to measure the reasonableness of the agencies' action against the reason given and not to superimpose its decision-making preferences. *Motor Vehicle Mfrs. Ass'n of United States, Inc. v.*

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[2] The immateriality of the "inconsistency" perceived by the panel majority is underscored by a more detailed review of the interagency debate. First, formal consultation had been commenced in accordance with then-existing practice. *Defenders I*, 420 F.3d at 952 n.3. It was thus unsurprising that the agencies began the § 7(a)(2) process without independently analyzing its necessity. Second, the Service contended in the interagency elevation document that "EPA Region 9 retains Federal oversight for the [state NPDES] program and thus there is a lingering Federal nexus from which EPA Region 9 can address effects to the listed species." NAHB Pet. App. at 567. The corollary to this contention was the existence of agency action for ESA § 7(a)(2) purposes. *See Defenders I*, 420 F.3d at 962 (discussing the need for "nexus" between the agency action and impact on listed species). EPA disagreed with the Service's position concerning the presence of continuing oversight authority (NAHB Pet. App. at 564), and the agencies' differences were resolved in the EPA's favor only in the biological opinion itself. It made no sense to conclude that the biological opinion – and hence EPA's reliance on it – was somehow deficient in not disposing of an issue only of theoretical significance given the fact that consultation *had* taken place and produced a no-jeopardy opinion. The court of appeals therefore would have been confronted with the same substantive question even had the agencies found the transfer determination outside the reach of ESA § 7(a)(2): whether any impacts associated with that determination – most particularly loss of ESA consultation – were the result of congressionally mandated, and not agency, action.

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983). Any other conclusion effectively allows the reviewing court to substitute its judgment of the proper decision-making template for that of the agency – a result which runs counter to the settled principle that a "judicial judgment cannot be made to do service for an administrative judgment," *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459 (1943), and in which the Ninth Circuit recently was counseled. *See Gonzales v. Thomas*, ___ U.S. ___, 126 S.Ct. 1613, 1615 (2006) (*per curiam*); *INS v. Ventura*, 537 U.S. 12, 123 S.Ct. 353 (2002) (*per curiam*).

Finally, even had the majority below been correct on the "inconsistency" issue, remand for clarification would be inappropriate in light of the ensuing analysis in Part III.C of the decision. The majority rejected there the position advanced by EPA in the elevation document – and ultimately adopted in the biological opinion – that EPA lacked power to impose ESA-related conditions as part of the Arizona program approval and, in so rejecting, resolved the "action" issue. *See, e.g., Defenders I,* 420 F.3d at 967 (construing ESA § 7(a)(2) as independently conferring agency power "to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments"). Because the court directed the discussion in Part III.C to one of the substantive predicates for the biological opinion's determination, it articulated a ground for granting the petition for review *independent* of the "inconsistency" ruling. The court's holding in Part III.C thereby resolved the question nominally left open for remand in Part III.B.

In sum, there is no basis for remand to EPA. The agencies' staff-level deliberations did not affect the ultimate outcome of the administrative process. Neither EPA, nor the Service for that matter, acted inconsistently with respect to the *final action* on review, which, as Judge Kozinski later pointed out, was the only reviewable action. *Defenders II,* 450 F.3d at 396. Whether or not consultation was initially required, "[w]hen deciding whether to transfer permitting authority, the [Service] issued, and the EPA relied on, a Biological Opinion premised on the proposition that the EPA lacked authority to take into account the impact of that decision on endangered species and their habitats." *Defenders I*, 420 F.3d at 950. This case, therefore, is not like *Thomas* or *Ventura*, where the court of appeals improperly augmented the administrative proceedings by deciding a factual issue not previously considered by the agency. *Thomas*, 126 S.Ct. at 1614 (whether family members constituted "a particular social group" within the scope of 8 U.S.C. § 1101(a)(42)(A)); *Ventura*, 537 U.S. at 13-14, 123 S.Ct. at 354 (whether changed circumstances disqualified individual seeking political asylum regardless of his past persecution). Rather, because the agencies had, in fact, consulted, produced a biological opinion and adhered to its contents, the court of appeals was required to review that process. *See Defenders II,* 450 F.3d at 394, n.1 (Berzon, J., concurring). The issues presented – whether EPA had to consult in the first instance, or whether EPA had authority to condition its decision for the benefit of threatened and endangered species – were then, and continue to be, questions of federal law and should be resolved now by this Court. Remand for clarification of the consulting agencies' views on the law would be useless, since the Service and EPA have answered the

dispositive question already by authoring and adopting the biological opinion itself.[3]

II. ESA § 7(a)(2) DOES NOT REQUIRE CONSULTATION ON THE TRANSFER OF NPDES PERMITTING AUTHORITY TO THE STATES OR VEST EPA WITH POWER TO CONDITION TRANSFER ON TERMS OTHER THAN THOSE IN CWA § 402(b).

A. CWA § 402(b) Requires Transfer upon Satisfaction of Its Exclusive Criteria.

The CWA could not be plainer about the centrality of the States' role in its administration. "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). "It is the policy of Congress that the States . . . implement the permit programs under Sections 1342 [NPDES] and 1344 of this title." *Id.* As explained in the *Amici* States' brief supporting EPA's petition for certiorari, moreover, the evolution of federal clean water regulation illustrates Congress' intent to respect and promote the role of the States to prevent water pollution. Water Pollution Control Act of 1948, Ch. 758, § 1, 62 Stat. 1155 (1948); Water Pollution Control Act Amendments of 1956, ch. 518, § 1, 70 Stat. 498 (1956);

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[3] The panel majority's comment that "the Biological Opinion's flaws are *legal* in nature" and that "[d]iscerning them requires no technical or scientific expertise" is telling in this regard. *Defenders I*, 420 F.3d at 976. What exists here is simply a difference of opinion between the agencies and the court of appeals over how to construe two statutes – a disagreement predicated on both decisionmakers actually having addressed the same "legal" issue.

Water Quality Act of 1965, Pub. L. No. 89-234, § 5, 79 Stat. 903, 907-08 (1965); Clean Water Restoration Act of 1966, Pub. L. 89-753, §§ 101, 201, 80 Stat. 1246, 1247 (1966); S. REP. NO. 92-414, at 1 (1971) ("For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution."). The 1972 amendments continued this policy. *See,* 33 U.S.C. § 1251(b); 33 U.S.C. § 1251(g) (States' authority to allocate water supply not abrogated by the CWA); 33 U.S.C. § 1288 (States' authority and role in waste treatment management); 33 U.S.C. § 1344(g)-(j) (States' authority to administer their own programs for discharge of dredged and fill material); 33 U.S.C. § 1370 (States' authority to control pollution, unless a State's standard is less stringent than that in the CWA).

The clearest proclamation of the congressional preference for state control is found in CWA § 402 which creates the NPDES Program. Under CWA § 402(b), EPA has this responsibility only until it is assumed by a State, and only thereafter if the State fails to fulfill it. Senator Edmund Muskie, the Senate floor leader for the 1972 amendments, recognized this fundamental policy during congressional debate:

> What [the CWA] does is continue the Federal Government's authority with respect to major polluters . . . until such time as the States can develop permanent authority of their own. *At that time it is the expectation of this bill and of this administration to have the States assume that permanent authority and to administer the law directly.*

117 Cong. Rec. 38845 (1971) (emphasis supplied); *see also* 118 Cong. Rec. 33747, 33750 (1972) (statement of Rep.

Jones) (" . . . it is intended that the State shall have primary responsibility for determining whether a discharge complies with the [CWA § 402] guidelines").

The respective versions of the 1972 amendments in the Senate and House differed significantly on this issue prior to resolution by the joint committee. The Senate bill, S. 2770, provided that "[u]nder section 402, the Administrator *can* delegate permit authority to a State if the State program is adequate." H.R. REP. NO. 92-1465, at 138 (1972) (Conf. Rep.) (emphasis supplied). The House amendment provided for "a State to administer its own permit program in lieu of the Administrator's program, and *the Administrator is required to approve a submitted State program* unless he finds that there is not adequate authority to issue the permits in accordance with the requirements of [the CWA]." *Id.* at 139 (emphasis supplied). In resolving this conflict, the conference adopted the House amendment, providing that the Administrator "shall approve" the State program if he finds adequate authority exists to administer the NPDES program. *Id.*; 33 U.S.C. § 1342(b).

Congress further recognized that once NPDES authority was transferred to a state, a permit issued by the State would be a state, not a federal, permit. *See, e.g.,* 118 Cong. Rec. 33761 (1972) (statement of Rep. Wright) ("These would be State, not Federal, actions, and thus . . . such permits would not require environmental impact statements."); 118 Cong. Rec. 10201, 10207 (1972) (statement of Rep. Jones) (describing the goal of § 402 as "State

administration of State programs").[4] Similarly, EPA must suspend the issuance of federal permits not later than 90 days after the date on which the State has submitted a program. 33 U.S.C. § 1342(c). *See also* S. REP. NO. 92-414, at 71 ("after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program."). All permits issued thereafter are state permits pursuant to the State program.

CWA § 402(b) provides EPA "*shall* approve each . . . submitted program unless" the agency "determines that adequate authority does not exist" to administer the program in compliance with nine specific criteria. 33 U.S.C. § 1342(b)(1)-(9) (emphasis supplied). *See also* 40 C.F.R. §§ 123.1(c), 123.61(b). The plain language of CWA § 402(b) is clear. Congress intended the States would be entitled to administer the NPDES Program, provided the State could meet these stated requirements. As is often the case, the foregoing review of the CWA's legislative history "merely confirms that Congress intended the statute to mean exactly what its plain language says." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574, 102 S.Ct. 3245, 3251-252 (1982). Numerous courts, accordingly, have

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[4] Congress also recognized CWA § 401, 33 U.S.C. § 1341 does not apply to permits issued by a State under CWA § 402(b) because "permits granted by States under section 402 *are not Federal permits – but State permits.*" H.R. REP. NO. 92-911, at 127 (1972) (emphasis supplied). Congress thus included a provision in CWA § 402(b) that requires any permit program administered by a State to insure that any other State whose waters may be affected by the issuance of a permit have an opportunity to submit written recommendations with respect to the permit application. *Id.*

found EPA lacks discretion to deny approval if a state's program meets the nine exclusive criteria. *See EPA v. California*, 426 U.S. 200, 208, 96 S.Ct. 2022, 2026 (1976); *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998); *Save the Bay, Inc. v. Adm'r, EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979). Because Arizona's application met all nine requirements of CWA § 402(b), EPA was obligated to transfer NPDES permitting authority to the State.

As discussed next, the consultation process conducted by EPA and the Service was unnecessary from the outset. Nevertheless, once conducted, the agencies properly concluded that EPA could not impose additional conditions precedent to the CWA § 402(b) transfer for the benefit of species. Thus, the biological opinion, while superfluous, reached the correct result with regard to the "effects of the action" component of the jeopardy analysis.

B. The ESA Does Not Impliedly Repeal or Amend CWA § 402(b).

The plain language and legislative history of CWA § 402(b) demonstrate EPA's categorical mandate to transfer permitting authority to a State when the latter's proposal meets the nine statutory criteria. The fundamental question in this case is whether EPA's obligations to transfer were superseded or amended when Congress enacted ESA § 7(a)(2). The panel majority's implicit conclusion in the affirmative is contrary to this Court's holdings concerning the implied repeal or amendment of statutes, as well as the plain language and legislative

history of the ESA itself. Moreover, it ignores the Service's properly promulgated regulatory interpretation of the statute.

1. Ordinary implied repeal standards are not satisfied here.

An implied amendment or repeal is an act which purports to be independent, but which alters, modifies, or adds to a prior act. The "cardinal rule" in this arena of statutory construction is "that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549-550, 945 S.Ct. 2474, 2482 (1974). "[T]he intention of the legislature to repeal must be clear and manifest." *TVA v. Hill*, 437 U.S. 153, 189, 98 S.Ct. 2279, 2299 (1978). Another "basic principle of statutory construction [is] that a statute dealing with a narrow, precise, and specific subject is not subsumed by a later enacted statute covering a more generalized spectrum ... unless the later statute expressly contradicts the original act or unless such a construction is *absolutely necessary* in order that the words of the later statute shall have any meaning at all." *Traynor v. Turnage*, 485 U.S. 535, 547-48, 108 S.Ct. 1372, 1381-382 (1988) (internal citations and quotations omitted; emphasis added). The cardinal rule controls here. There is no expression anywhere in the ESA of Congress' intent to repeal prior existing mandates, and it is not "absolutely necessary" to find an implied amendment because EPA's statutory obligation under CWA § 402(b) can be read *in pari materia* with ESA § 7(a)(2).

When possible, the courts must strive to reconcile apparently competing mandates. In *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n*, for example, this

Court reconciled apparently conflicting provisions of the Railway Labor Act and Interstate Commerce Act explaining that its effort:

> . . . responds to our obligation to avoid conflicts between two statutory regimes, namely, the RLA and ICA, that in some respects overlap. As the Court has said, we "are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). We should read federal statutes "to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988).

491 U.S. 490, 510, 109 S.Ct. 2584, 2596 (1989); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 1993 (1976) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts . . . to regard each as effective."); *see also Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 332-33, 59 S.Ct. 196, 200 (1938) ("Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."); *cf. Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 393, 5 L.Ed. 281, 288 (1821) (Court's duty is "to construe the Constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."). As explained next, nothing in the

ESA or its legislative history suggests that the requirements of ESA § 7(a)(2) override CWA § 402(b).

2. Nothing in the language or history behind ESA § 7(a)(2) supports the panel majority's conclusion that the law expands existing agency authority.

To support its interpretation, the panel majority relied principally on ESA § 7(a)(2)'s "insure" language as discussed by this Court in *Hill. Defenders I,* 420 F.3d at 964-967. This Court there enjoined completion of Tellico Dam because the dam's operation would "either eradicate the known population of snail darters or destroy their critical habitat." *Hill,* 437 U.S. at 171, 98 S.Ct. at 2290. However, *Hill* "did not . . . consider whether Section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA." *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC,* 962 F.2d 27, 34 (D.C. Cir. 1992); *Accord Nat'l Wildlife Fed'n v. Burlington N.R.R.,* 23 F.3d 1508, 1512 (9th Cir. 1994). Therefore, *Hill,* on its face lends no support whatsoever to the conclusion that ESA § 7(a)(2) superimposes a tenth criterion on CWA § 402(b) or, to put the proposition negatively, independently empowers EPA to ignore the clear direction of CWA § 402(b).

The majority also relied on its perceived distinction between ESA §§ 7(a)(1), 16 U.S.C. § 1536(a)(1), and 7(a)(2). *Defenders I,* 420 F.3d at 965. ESA § 7(a)(1) directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of species." Because ESA § 7(a)(1) refers to agencies' "authorities" while ESA § 7(a)(2) does not, the majority concluded, by negative inference, that Congress intended to

grant additional authority to federal agencies in ESA § 7(a)(2). *Id.* That inference is belied by the evolution of ESA § 7.

As the panel majority noted, ESA §§ 7(a)(1) and 7(a)(2) originated as a single provision. It read:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary *to insure that actions authorized funded or carried out by them do not jeopardize* the continued existence of such endangered species and threatened species *or result in the destruction or modification of habitat* of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphasis supplied).[5] Thus, in the

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[5] In 1982, the Congressional Research Service ("CRS") prepared for the Senate Committee on Environment and Public Works a summary of the legislative history of the ESA "[i]n order to preserve the context in which the Act was developed, to aid interpretation of provisions finally adopted, and to assist the Congress in the reauthorization process." Congressional Research Service, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980 ("ESA Leg. Hist.") at v. This authority is relied on extensively in the majority opinion below. *See, e.g., Defenders I*, 420 F.3d at 965-66. In describing the original obligations of federal agencies like EPA under ESA § 7, the CRS explained:

> All other Federal departments and agencies are to consult with the Secretary of Commerce or the Secretary of the

(Continued on following page)

original version of § 7 (applied in *Hill*), the obligations of federal agencies to carry out conservation programs (now contained in § 7(a)(1)) and to avoid jeopardy (now contained in § 7(a)(2)) were *both* qualified by the phrase "utilize their authorities." *Id.*[6]

> Interior, as appropriate, and with the assistance of those Secretaries *to use their authorities* to carry out endangered and threatened species conservation programs, to see that actions authorized, funded or carried out by them do not have adverse effects on the survival of such species including destruction of habitat deemed critical to their survival as determined by the appropriate Secretary.

Id. at 6. (Emphasis supplied). This summary reflects the intent expressed clearly in the House Report accompanying HR 37:

> The basic purpose of the Act is clearly stated in the legislation; to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, protected, or restored. In furtherance of this purpose, the bill declares a policy that Federal agencies are to *use the authorities that are available to them* in carrying out the objectives of the bill.

Id. at 145 (H.R. REP. NO. 93-412 (1973)) (emphasis supplied).

[6] In support of its contrary view, the majority panel drew too much from Rep. Dingell's discussion on the House floor of the import of ESA § 7. *Defenders I*, 420 F.3d at 965 (quoting Rep. Dingell). The majority failed to apprehend that the entirety of Rep. Dingell's discussion at that point in the congressional record is prefaced with the following statement:

> Another important step which we have taken in this bill – and in this regard the two bills are virtually identical – is that we have substantially amplified the obligation of both [wildlife] agencies and other agencies of the Government as well, to take steps *within their power* to carry out the purposes of this act.

ESA Leg. Hist. at 481. That agencies "can" and "must", *Defenders I*, 420 F.3d at 965, exercise that power at appropriate times to comply with the law is hardly remarkable. There is no indication, however, that Rep. Dingell (or anyone else on the House floor) believed that Congress was vesting agencies with authority to disregard congressional directives by virtue of ESA § 7.

When Congress separated ESA § 7 into subsections in 1978, the drafters explained that this editorial revision did not modify existing law:

> The conferees adopted Senate language creating a new Section 7(a), *which essentially restates section 7 of existing law,* and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The conferees felt that the Senate provision by retaining existing law, was preferable.

H.R. REP. NO. 95-1804 at 18 (1978) (Conf. Rep.) *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486 (emphasis supplied). Congress' intent to retain within ESA § 7(a)(2) the temperance expressed in the original version of ESA § 7 could not have been more explicit.

As the panel majority noted, Congress significantly amended the ESA in 1978, 1979 and 1982 after *Hill* was decided. Nowhere, however, did the amendments purport to convey new authority to action agencies like EPA. Even were there ambiguity on this score, the legislative history in connection with those amendments (including those enacting ESA §§ 7(g) and 7(h) relied on by the majority) does not suggest that ESA § 7(a)(2) confers additional authority on action agencies not possessed under their existing authorities. *See, e.g.,* H.R. REP. NO. 95-1625 (1978) *reprinted in* 1978 U.S.C.C.A.N. 9453, 9461-62 (discussing "Section 7 and the consultation process"); H.R. REP. NO. 95-1804 (1978) (Conf. Rep.), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9485-86 (discussing "Interagency Cooperation"); S. REP. NO. 96-151 (1979); H.R. REP. NO. 96-167 (1979) *reprinted in* 1979 U.S.C.C.A.N. 2557, 2561-62 (discussing "Section 7 and the Consultation Process"); H.R.

REP. NO. 97-567 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824-29 (discussing "Interagency Cooperation and Committee Exemptions").

Finally, the panel majority failed to put ESA § 7(a)(2) in context with the remainder of the law. The ESA's other key substantive provision is prohibitory in nature, *see, e.g.*, ESA § 9 (Prohibited Acts), 16 U.S.C. § 1538, and Congress' overall policy directs federal agencies to "*utilize their authorities* in furtherance of the purposes of this chapter." ESA § 2(c)(1), 16 U.S.C. § 1531(c)(1) (emphasis supplied). When Congress wanted to confer authority not otherwise possessed, it did so expressly. *See* ESA § 5, 16 U.S.C. § 1534, (requiring and empowering the Secretary of Agriculture to implement conservation programs in the National Forest System). As this Court explained in *King v. St. Vincent Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 579 (1991), "a statute is to be read as a whole" because, of course, "the meaning of statutory language, plain or not, depends on context." The context in which ESA § 7(a)(2) resides makes clear Congress' intent to respect limitations placed on agencies' discretion by other legislative commands.

3. The Service, charged with administering ESA § 7(a)(2), has concluded the statute does not expand existing agency authority.

In light of the foregoing, it is clear that ESA § 7(a)(2) does not expand agencies' existing authorities in the manner stated by the panel majority. Nevertheless, even had the majority made a plausible case for some ambiguity as to this issue, the court ignored its duty under *Chevron* to defer to the Service's reasonable interpretation of ESA

§ 7(a)(2)'s application as embodied in 50 C.F.R. § 402.03, which states unequivocally:

> Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

Compare 50 C.F.R. §§ 402.02, 402.14(g)(8) (requiring reasonable and prudent alternatives "consistent with the scope of the Federal agency's legal authority and jurisdiction."); *id.* § 402.16 (requiring reinitiation of formal consultation "where discretionary Federal involvement or control over the action has been retained").

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, this Court summarized the analysis the majority should have performed in light of 50 C.F.R. § 402.03:

> In *Chevron* this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866, 104 S.Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, *even if the agency's reading differs from what the court believes is the best statutory interpretation.* *Id.*, at 843-844, and n.11, 104 S.Ct. 2778.

545 U.S. 967, 125 S.Ct. 2688, 2699 (2005) (emphasis supplied). *See also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S.Ct. 1171, 1175 (1991) (agency's regulatory interpretation entitled to

"substantial deference"). *Compare Defenders II*, 450 F.3d at 397 (Kozinski, J.) ("The majority forgets that FWS is the agency charged with administering the ESA, and that its interpretation of the ESA is thus entitled to *Chevron* deference.").

Even greater deference is due the Service's interpretation, considering it has been in effect for over 20 years and is consistent with multiple lower court interpretations. *See Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule*, 51 Fed. Reg. 19,926 (June 3, 1986) (promulgating 50 C.F.R. § 402.03); *In re Operation of the Missouri River System Litigation,* 421 F.3d 618, 630 (8th Cir. 2005); *American Forest,* 137 F.3d at 291; *Platte River,* 962 F.2d at 33; *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) ("The [ESA] does not, by its terms, enlarge the Corps' jurisdiction under the [CWA]."). In *N.L.R.B. v. Bell Aerospace Co. Division of Textron Inc.*, 416 U.S. 267, 274, 275, 94 S.Ct. 47, 1761-62 (1974), this Court explained under such circumstances, "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *See also Chemehuevi Tribe of Indians v. F.P.C.*, 420 U.S. 395, 408-410, 95 S.Ct. 1066, 1074-1075 (1975) (affording deference to "longstanding administrative construction" of the Federal Power Commission regarding its jurisdiction to license thermal power plants).

Instead, the panel majority refused even to acknowledge the import of the Service's regulation, which spoke directly to the issue before it. *See Defenders I,* 420 F.3d at 967 ("Section 7(a)(2) applies to all agency actions 'authorized, funded or carried out' by the agency in question. . . . *Our* determination as to whether the transfer decision is covered thus depends on the meaning of those terms.")

(Emphasis supplied); *see also id.* at 969 n.19 ("The dissent argues that we should nonetheless affirm the EPA's action based on § 402.03 because the question is one of statutory interpretation. But that is simply not so; § 402.03 is a regulation, not a statute."); *Defenders II,* 450 F.3d at 397-98 ("Having decided to conduct – on its own – the very analysis that FWS already conducted, the majority comes out the other way, getting it flatly wrong.") (Kozinski, J., dissenting). Unable to reconcile its *own* view of ESA § 7(a)(2) with the Service's, the majority marginalized the agency's regulatory interpretation as a mere "gloss" on the statute, *Defenders I,* 420 F.3d at 967, and "simply [found] that the word 'discretionary' in the regulation is meaningless." *Defenders II,* 450 F.3d at 398 (Kozinski, J., dissenting).

In this case, based on 50 C.F.R. § 402.03, EPA and, more importantly, the Service rightly "determined – after careful study at the local and national levels – that the ESA was inapplicable to EPA's decision, and it issued a BiOp relaying its conclusions to the EPA." *Defenders II,* 450 F.3d at 397 (Kozinski, J., dissenting); *see also id.* at 396 ("under FWS's interpretation, the ESA was inapplicable: EPA's decision to grant the transfer could not 'cause' any impact on endangered species because the decision was non-discretionary"). *Compare Missouri River,* 421 F.3d at 630 ("Case law supports the contention that environmental – and wildlife-protection statutes do not apply when they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority."). *See also* James C. Kilbourne, THE ENDANGERED SPECIES ACT UNDER A MICROSCOPE: A CLOSEUP LOOK FROM A LITIGATOR'S PERSPECTIVE, 21 Envt'l L. 499, 528 (1991) (Explaining that 50 C.F.R. § 402.03

represents an exception to the "sweeping definition of 'action,' which render[s] section 7's substantive and procedural obligations inapplicable."). While the panel majority might not have preferred the agency's conclusion, it could not "overturn FWS's statutory interpretation simply because it disagree[d] with it." *Id.* Rather, the majority was required to defer to the Service's reasonable interpretation of 50 C.F.R. § 402.03. Had it done so, the biological opinion would have been upheld, and the fabricated conflict between ESA § 7(a)(2) and CWA § 402(b) would have been eliminated.

In the end, the plain intent and legislative history of the statute, the Service's longstanding construction of its application, and the treatment by the courts of appeal all show that ESA § 7(a)(2) is not a "font of new authority." *American Forest*, 137 F.3d at 299. *Compare Bell Aerospace*, 416 U.S. at 289, 94 S.Ct. at 1769 ("In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that 'managerial employees' are not covered by the Act.").

C. Crediting the Majority's Construction Would Have Dramatic Consequences on the States – Even Those With Approved NPDES Programs.

Perhaps the greatest problem with the majority panel's interpretation is that it not only erects new hurdles for the five states that have not yet achieved NPDES

primacy,[7] but also casts doubt on the continuing vitality of NPDES programs currently administered by *forty-five States* that already possess such authority.[8]

Under the Service's consultation regulations, a federal agency like EPA is obligated to reinitiate ESA § 7(a)(2) consultation on prior actions under four separate circumstances. 50 C.F.R. § 402.16 (authorized "take" excedance (§ 402.16(a)); new information revealing new effects (§ 402.16(b)); modification of the action, which causes a new effect (§ 402.16(c)); or new protected species or habitat identified in the action area (§ 402.16(d)). *N. Alaska Env'l Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006); *Forest*

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[7] The requirement of ESA consultation on a program approval could, in practice, prove difficult to implement, since neither state nor federal agencies can know at that stage what kinds of projects the approved state might ultimately permit. *See* Brief of *Amicus Curiae* State of Alaska in Support of Petitions for Writ of Certiorari at 3-5.

[8] While this case arises in the context of a single program under the CWA, the potential impact of the court of appeals' holding could implicate *all* federal programs. The court of appeals expanded significantly action agencies' ability to exceed limits otherwise constraining their authority and of wildlife agencies to formulate reasonable and prudent alternatives that, if implemented, could entail action contrary to action agencies' other statutory duties. *See Defenders II*, 450 F.3d at 399, n.4 (Kozinski, J., dissenting). That interpretation threatens to disrupt other largely settled relationships with the Federal Government, such as, for example, the requirement that the U.S. Bureau of Reclamation comply with State water law. *See* Reclamation Act, ch. 1093, § 8, 30 Stat. 388, 390 (1902) (codified at 43 U.S.C. §§ 372, 383) and *California v. United States*, 438 U.S. 645, 665, 667, 98 S.Ct. 2985, 2996, 2997 (1978). *Compare Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1158 (2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) (Kelley, J., dissenting) (criticizing the majority for ignoring § 8 and transforming the ESA into a "Frankenstein" that, "despite the good intentions of its creators, has become a monster" by allowing "the federal government to overturn this established [Reclamation Act] precedent.").

Guardians v. Johanns, 450 F.3d 455 (9th Cir. 2006); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987).

The duty to reinitiate consultation is tempered by language nearly identical to that appearing in 50 C.F.R. § 402.03, which the panel majority deemed "coterminous" with the language of ESA § 7(a)(2). *Defenders I*, 420 F.3d at 969. To the extent the majority's analysis of ESA § 7(a)(2) stands, it is virtually certain that EPA will voluntarily (or involuntarily) revisit decisions made long ago to transfer authority under CWA § 402(b). The States' investment in their NPDES programs could be lost entirely as a result of forced ESA compliance. A determination that the *Amici* States must forfeit their programs would run contrary to this Court's recognition of States' dominant role in regulating their waters. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174, 121 S.Ct. 675, 684 (2001) (acknowledging "the States' traditional and primary power over land and water use").

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

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487c Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE AMERICAN BIRD CONSERVANCY, ENVIRONMENTAL DEFENSE, NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, THE WILDERNESS SOCIETY, AND WORLD WILDLIFE FUND IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Environmental Defense is a non-profit organization that represents over 500,000 members. Since 1967, Environmental Defense has linked science, economics, law, and private-sector partnerships to create solutions to many of the most serious environmental problems.

Amicus American Bird Conservancy ("ABC") is a U.S non-profit organization dedicated to the conservation of native wild birds and their habitats throughout the Americas. ABC works in partnership with a wide range of stakeholders from indigenous communities and private landowners, to corporations, government agencies, and other NGOs. ABC is incorporated in Delaware with over 7,000 members.

Amicus National Audubon Society, Inc. is a non-profit corporation organized under the laws of the State of New York, with its principal office at 700 Broadway, New York, New York 10003. National Audubon has more than 367,000 members, offices in 23 states, and a presence in all 50 states through more than 450 certified chapters and through its nature centers, sanctuaries, and education and science programs. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All parties other than the United States submitted letters to the Court consenting to the filing of all *amicus curiae* briefs. The consent of the United States has been filed with the clerk.

Amicus Natural Resources Defense Council ("NRDC") is a non-profit conservation organization incorporated under the laws of New York State. NRDC represents over 525,000 members nationwide, over 10,000 of whom live in Arizona. Through its litigation, scientific, and advocacy efforts, NRDC has long been active in efforts to protect endangered species, restore integrity to the earth's resources and establish sustainability and good stewardship of the earth.

Amicus Sierra Club is a non-profit corporation organized under California law, with more than 700,000 members in the United States. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

Amicus The Wilderness Society is a non-profit public interest membership organization headquartered in Washington, D.C. Founded in 1935, the Society and its approximately 250,000 members and supporters are dedicated to protecting a national network of wild lands and fostering an American land ethic. The Society works to ensure wise management and protection of America's public lands and the wildlife therein. The Society fulfills its mission through public education, analysis, and advocacy.

Amicus World Wildlife Fund ("WWF") has been protecting the future of nature for over 45 years. The largest multinational conservation organization in the world, WWF works in 100 countries and is supported by 1.2 million members in the United States and close to 5 million globally. WWF's unique way of working combines global reach with a foundation in science, involves action at every level from local to global, and ensures the delivery of innovative solutions that meet the needs of both people and nature.

Amici curiae and their members and supporters highly value rare wild plants and animals for their aesthetic, ecological, educational, historical, recreational, scientific, utilitarian, and other values. They have a special interest in the effective administration of Section 7 of the Endangered Species Act because of its important role in fostering efforts to reconcile the survival imperatives of rare species with other societal objectives.

SUMMARY OF ARGUMENT

In this case, the government contends that, in carrying out an action it characterizes as non-discretionary pursuant to a statute that was enacted prior to the Endangered Species Act ("ESA"), and that, not surprisingly, makes no mention of endangered species, a federal agency may disregard a requirement of the subsequently enacted ESA that, on its face, applies to "any action authorized, funded, or carried out by" a federal agency. That broad contention cannot be reconciled with either the plain language or the purpose of Section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2). The plain language of Section 7(a)(2) applies to all actions "carried out" by federal agencies and requires such agencies to explore every available means of reducing the likelihood that such action will have a prohibited effect. Because the focus of Section 7(a)(2) encompasses the execution of actions, as well as the decisions to undertake those actions, and because the mandate of Section 7(a)(2) is both procedural and substantive, principles applicable to the interpretation of the National Environmental Policy Act ("NEPA") do not limit the application of Section 7(a)(2).

The government's contention would, moreover, frustrate the purposes of the ESA and render nugatory the interagency consultation process that Congress has repeatedly declared to be the intended – and largely successful – means of resolving apparent conflicts between the ESA's conservation goals and the objectives of other

laws. In doing so, it would foreclose the required careful consideration of all measures within the authority of the Environmental Protection Agency ("EPA") that could reduce the likelihood of a prohibited effect. Further, the government's contention improperly bypasses the Section 7 exemption process that Congress crafted to address the occasional, truly irresolvable conflicts between species survival imperatives and other agency responsibilities.

Although ESA implementing regulations limit the applicability of Section 7(a)(2) to federal actions in which there is "discretionary Federal involvement or control," consideration of their history compels the conclusion that they were intended to distinguish completed federal actions from actions over which a federal agency has ongoing, yet-to-be completed responsibilities. Finally, the government's broad contention, if accepted by the Court, would lead to problematic consequences whereby agencies carrying out putatively "non-discretionary" actions would be unable to secure relief from the prohibition against incidentally taking endangered species – relief readily available for other federal actions and for private and other non-federal actions.

ARGUMENT

I. THE PLAIN MEANING OF SECTION 7(a)(2) ENCOMPASSES EPA'S ACTION

A. Section 7(a)(2) Focuses Not Merely On Decisions To Act, But On How Those Actions Are Carried Out.

Section 7(a)(2) of the ESA requires "each federal agency" in consultation with the U.S. Fish and Wildlife

Service or National Marine Fisheries Service,[2] to "insure that any action authorized, funded, or carried out" by it "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of the critical habitat of any such species. EPA contends that this requirement does not apply to its transfer to a state of the authority to implement the National Pollutant Discharge Elimination System ("NPDES") permitting program in that state pursuant to Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. §1342.[3] More broadly, EPA contends that Section 7(a)(2) does not apply to any "non-discretionary" federal action. Even assuming *arguendo* that EPA's action here is non-discretionary, its contention is contrary to the plain meaning

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[2] The National Marine Fisheries Service is primarily responsible under the ESA for marine and anadromous species; the U.S. Fish and Wildlife Service is primarily responsible for all other species. Unless the context requires reference to a particular agency, they will hereinafter be referred to collectively as "the Service" or "the Services."

[3] In prior proceedings in this case regarding the transfer to Arizona, as well as when considering similar transfers to other states, EPA and the Service have taken the position that Section 7(a)(2) applies. Notwithstanding those earlier positions, EPA now maintains categorically that "there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies." Brief for Petitioner EPA ("EPA Br.") at 49 (quoting the Fish and Wildlife Service). This "clarification" of EPA's position took place *after* the decision of the Court of Appeals in this case, and occurred in the context of a transfer of NPDES authority to Alaska, the only state without a single freshwater endangered or threatened species. See http://ecos.fws.gov/tess_public/StateListing.do?state=all (visited March 18, 2007). In light of this irregular procedure and for reasons set forth at length in Respondents' brief, EPA's decision should be remanded for further proceedings consistent with the requirements of Section 7(a)(2).

of Section 7(a)(2) and misapprehends the focus of that provision.

The focus of Section 7(a)(2) is on "actions" and their implementation. It plainly seeks to influence how actions are "carried out" by federal agencies, and not simply the process by which decisions to act are made. EPA asserts that whenever a federal agency merely carries out a decision required by the terms of another statute, it is Congress that is responsible for the ensuing effects, not the agency. However, Section 7(a)(2) is clear on its face that it applies to any action "carried out" by a federal agency, even when that action is pursuant to a statute, like the Clean Water Act, that was enacted prior to the ESA and, not surprisingly, makes no explicit mention of endangered species.

Rather than imply a limitation to actions over which an agency has discretion, the ordinary meaning of the phrase "carried out" connotes a much broader reach. "Carry out" means "to put into execution" (*Webster's Third New International Dictionary*, 1966), "to bring to a successful conclusion" (*Merriam Webster Pocket Dictionary*, 1994), or "to follow or obey" (*American Heritage Dictionary*, 4th ed. 2001). A soldier, for example, "carries out" the order of an officer, though the soldier's action can hardly be characterized as discretionary. By the same token, an agency whose action simply effectuates a decision according to specified criteria nevertheless "carries out" that action. Thus, when EPA transfers NPDES authority to a state, it "carries out" an action clearly subject to Section 7(a)(2). This Court in *TVA v. Hill*, 437 U.S. 153, 186 n. 32 (1978) characterized its holding as "giv[ing] effect to the plain words of the statute, namely that §7 affects all projects which remain to be authorized, funded, or carried out." The plain meaning of Section 7 is no less clear today.

B. The Reach Of Section 7(a)(2) Is Not Circumscribed By Decisions Limiting the Reach of NEPA

Because Section 7(a)(2)'s primary focus in on how agency actions are carried out, it is fundamentally different from the National Environmental Policy Act ("NEPA"). NEPA requires an environmental impact statement to accompany "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). NEPA's focus is on the *decision-making process* of federal agencies. See *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 100 (1983) (NEPA requires a hard look at environmental effects and "that the 'hard look' be incorporated as part of the agency's *process of deciding whether to pursue* a particular federal action") (emphasis added). Section 7(a)(2) of the ESA, in contrast, reaches well beyond the "process of deciding whether to pursue" an action to the matter of how to implement that action (the "carrying out" of the action). It requires that in carrying out any action, a federal agency "insure" that it is unlikely to have any of the effects proscribed there.

This critical difference between the focus of Section 7(a)(2) and that of NEPA distinguishes this case from *Department of Transportation v. Public Citizen*, 531 U.S. 752 (2004). In *Public Citizen* the Court held that it was the President's decision to allow Mexican trucks to operate in the United States – not the Federal Motor Carrier Safety Administration's ("FMCSA") carrying out of one aspect of that decision – that, for NEPA's purposes, was most important. As a result, the Court in *Public Citizen* reasoned that no purpose would be served by requiring the FMCSA to assess the environmental impact of a decision that the President had already made. Unlike NEPA, which governs only the decision-making process, the duty to "insure"

imposed by Section 7(a)(2) clearly rests with the agency that "carries out" an action, and seeks to influence how that action is carried out, not just how it is decided upon.[4]

Moreover, the Services themselves explicitly rejected NEPA-derived limitations on the scope of Section 7 only months before this Court decided *TVA v. Hill*. In January 1978, they jointly promulgated regulations in which the only issue regarding the reach of Section 7 concerned its application to previously initiated, nearly completed federal actions. 43 Fed. Reg. 869 *et seq.* (Jan. 4, 1978). The Services expressly followed the decision of the Sixth Circuit in *Hill v. TVA*, 549 F.2d 1064, 1071-72 (1977), and rejected "the incorporation of the NEPA case law into the section 7 regulations." 43 Fed. Reg. at 872. Their rejection of NEPA precedent as controlling Section 7 was effectively endorsed by this Court in *TVA v. Hill*, in which Chief Justice Burger found that NEPA decisions "are completely inapposite," because NEPA and the ESA "serve different purposes," with NEPA's requirements being essentially procedural whereas Section 7's are substantive. 437 U.S. 153, 188 n. 34. The Services' regulations remained in effect when Congress amended the ESA in 1978, 1979, and again in 1982.

Keenly aware of this Court's conclusion that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," 437 U.S. at 194, Congress took no action to limit the reach of

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[4] Moreover, *Public Citizen* did not hold that NEPA was inapplicable to the actions of the Federal Motor Carrier Safety Administration, but only that the effects of those actions were not substantial enough to trigger the preparation of an environmental impact statement. By contrast, here the government argues that EPA's delegation decision – and every other putatively "non-discretionary" federal action – lies wholly outside the reach of Section 7(a)(2). Nothing in *Public Citizen* warrants that extension of its holding.

Section 7. Instead, its response in 1978 was to fashion a special process through which federal actions could be exempted from the requirements of Section 7 *after* they had undergone interagency consultation and been found to conflict with those requirements. Nothing Congress said or did when amending the ESA in 1978, 1979, or 1982, when its attention was squarely focused on Section 7's duty to "insure," suggests that it had any different view of the scope of that duty than the very one reflected in the 1978 regulations.

II. THE REFERENCE IN THE REGULATIONS TO "DISCRETIONARY FEDERAL INVOLVEMENT OR CONTROL" DISTINGUISHES COMPLETED ACTIONS FROM ONGOING ACTIONS

A. History Of The Regulations

EPA relies heavily upon a Service regulation stating that Section 7 applies "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. §402.03. That reliance is misplaced, for the history of the regulation shows that its only purpose was to distinguish completed from ongoing federal actions.

The question of Section 7's application to actions already under way when a species was listed arose soon after the ESA's enactment. It was at the core of the suit filed in 1976 to halt TVA's construction of Tellico Dam, which had been authorized by Congress a decade earlier and was estimated by TVA to be 70 to 80 percent complete when a recently discovered fish was listed in 1975. At the time, there were no regulations interpreting Section 7. Rather, the U.S. Fish and Wildlife Service on April 22, 1976, promulgated non-regulatory "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." They advised that when

> "considering whether section 7 applies to actions in the ... implementation stage ... Federal agencies should determine if ... substantial work remains to be done which would, independent of the effect of earlier work performed, in and of itself jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species. If ... such work on a Federal project remains to be performed, then the requirements of section 7 should be satisfied."[5]

Weeks later, the district court decided *Hill v. TVA*, 419 F.Supp. 753 (E.D. Tenn. 1976). TVA had argued that it had no discretion to do anything other than complete the dam, "point[ing] out ... that the money appropriated to it was for the Tellico Project alone and that it had no authority to use the funds other than for that purpose." *Id.* at 760, n. 8. The court refused to enjoin completion of the dam, because "[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result." *Id.* at 760.

Like the guidelines they replaced, the first regulations proposed to implement Section 7 applied it to all federal actions except those for which there was no "substantial work" remaining that would independently jeopardize the continued existence of a listed species. 42 Fed. Reg. 4868 *et seq.* (Jan. 26, 1977). Shortly after they were proposed, the Sixth Circuit rejected any exemption for previously initiated, nearly completed projects. *Hill v. TVA*, 549 F.2d 1964 (6th Cir. 1977). Before the Sixth Circuit, "TVA claim[ed] to

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[5] The 1976 guidelines were never published. The quotation here is taken from *Hill v. TVA*, 419 F.Supp. 753, 761 (E.D. Tenn. 1976).

have done everything possible to save the snail darter, short of abandoning work on the dam," which it asserted was "innately unreasonable." *Id.* at 1074. Relying upon NEPA decisions, TVA argued that "the terminal phases of ongoing projects" should not be considered "actions" subject to Section 7. *Id.* at 1070. Expressly rejecting the "NEPA cases which waive compliance based upon advanced project construction," the Sixth Circuit held that "continued work, directed toward impoundment, violates" Section 7. 549 F.2d at 1072.

The Services' final regulations in 1978 provided that "Section 7 applies to all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat." 50 C.F.R. §402.03, as set forth at 43 Fed. Reg. 869, 875 (Jan. 4, 1978). The final regulation was identical to those proposed a year earlier, but the Services made clear that they too now rejected NEPA analogies in determining Section 7's reach:

> "It was originally believed that retroactive situations under NEPA and the Act were analogous enough to warrant the incorporation of the NEPA case law into the Section 7 regulations."
>
> "The Sixth Circuit Court of Appeals in the recent case of *Hill v. TVA* ... specifically considered this analogy and rejected it. ... The Court noted that as long as some Federal discretionary control or involvement remained that could avoid jeopardizing the listed species or adversely modifying or destroying its critical habitat, the degree of completion of a project was irrelevant. In light of the Sixth Circuit Court of Appeal's analysis, therefore, the FWS and NMFS now reject the analysis of retroactivity in the proposed rulemaking's

> preamble and adopt the rationale of the Sixth Circuit."

43 Fed. Reg. at 872.

In 1983, the Services proposed an overhaul of their regulations implementing Section 7. 48 Fed. Reg. 29990 *et seq.* (June 29, 1983). Proposed §403.03 said: "Section 7 and the requirements of this Part apply to all actions in which there is Federal involvement or control." Like both the 1978 regulations and the 1976 guidelines, the proposed regulations drew no distinction between "discretionary" and "non-discretionary" actions. Nor did the proposed definition of "action," which included "all activities of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." See proposed §402.2, 48 Fed. Reg. at 29998. Thus, proposed §402.3 reaffirmed the longstanding view of the Services that – apart from completed actions – Section 7 applied without qualification or limitation to *all* federal actions.

The rulemaking initiated in 1983 yielded final regulations in 1986. 51 Fed. Reg. 19926 *et seq.* (June 3, 1986). Those regulations renumbered proposed §402.3 as §402.03 and inserted the word "discretionary" immediately before the phrase "Federal involvement or control.". Given that the proposed regulations, the 1978 final regulations, and the 1976 guidelines had not limited Section 7's applicability to actions in which there was "discretionary" federal involvement or control, one would have expected the Services to explain the intention behind the addition of this word, particularly if it was meant to effect a limitation beyond the established limitation covering completed actions. However, the Services said nothing on the matter. Instead, the entirety of the explanation offered for §402.03 was as follows:

> "This section, which explains the applicability of section 7, implicitly covers Federal

> activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of 'action' in §402.02. The explanation for the scope of the term 'action' is provided in the discussion under §402.01 above."

51 Fed. Reg. at 19937 This explanation addressed the quite different issue of the extraterritorial application of Section 7, and specifically it sought to make clear that the term "action" in §402.03 was limited to actions occurring in the territorial United States or on the high seas. Accordingly, it is far more plausible that the final regulations adopted in 1986 intended no departure from the settled understanding that Section a)(2) applies broadly to all yet-to-be completed federal actions, than that the Services intended a wholly new class of exempt activities for which they offered not a word of explanation.

B. Subsequent Interpretation By The Services

The conclusion from the foregoing history is consistent with how the Services appear to understand their own regulation in their jointly published *Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act.*[6] With only two possible exceptions, whenever reference is made in the Handbook to "discretionary" federal actions, the context clearly applies to previously initiated, not yet completed, actions.[7]

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[6] www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm (visited March 22, 2007).

[7] See, *e.g.*, Handbook, page 2-15 ("water projects that predate the Act are subject to consultation if the agency retains any discretion in continuing project operations"); page 4-28 (discussing the types of analyses required

The only two occasions where the Handbook refers to "discretionary" federal actions more broadly provide little support for EPA's position here. In fact, the first reference appears to contradict that position:

> "The Act requires action agencies to consult or confer with the Services when there is discretionary Federal involvement or control over the action, whether apparent (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program)."

Handbook at 2-6. Rather than support EPA's position, this appears to say that "state operation" of the NPDES program, subject to retained federal oversight, is an action on which consultation is required. The other reference memorializes the Services' understanding of the holding in *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C.Cir. 1992):

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for "ongoing discretionary operations of Bureau [of Reclamation] and Corps of Engineers water facilities"); pp. 4-60, B-12, and B-32 (discussing requirement to reinitiate consultation on an ongoing project "where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law)"); pp. 6-5, B-16, and B-25 (discussing requirement to initiate formal consultation on action that was the subject of "conferencing" regarding a species that had been proposed for listing if, "prior to the completion of the action or while [the agency] still maintains any discretionary authority" the species is listed); page. B-48 (advising that no "reinitiation notice" need be included in the report that concludes the conferencing process for projects affecting species that are proposed to be listed "if discretionary Federal agency involvement has terminated"; and p. E-24 (Service project leaders have a "continuing responsibility to determine if discretionary ongoing activities of the Service" comply with the requirements of Section 7).

> "Annual operating permits issued prior to issuance of a new hydropower license are subject to the section 7 consultation if the Federal agency has discretion to determine the terms of the annual permits."

Handbook at 4-29. Closer examination, however, reveals that this memorialization of *Platte River* does not advance the government's position either.

In *Platte River*, certain dam licensees under the Federal Power Act were entitled to annual interim renewals of their expiring fifty-year licenses under the same terms as the original licenses until the Federal Energy Regulatory Commission ("FERC") could process a longer term renewal. The Handbook appears to regard this situation as an example of a completed federal action for which there is no remaining federal involvement that "in itself" could jeopardize a listed species. Thus, this single reference in the Handbook hardly stands for the broader proposition that the Services regard all non-discretionary federal actions as beyond the reach of Section 7(a)(2).

Whatever the Services' understanding of *Platte River* may be, an important distinction exists between the facts there and those here. *Platte River* noted that FERC would soon consult formally with the Service in connection with the pending relicensing. 962 F.2d at 33. Thus, *Platte River* dealt only with the temporary extension of existing dam operations and their impacts; formal consultation was imminent and would consider any changes needed to insure no jeopardy to listed species. Here, however, the status quo is not being continued temporarily, but is being fundamentally altered,

and the decision is of indefinite duration, rather than transitory.[8]

III. EPA'S CONTENTION IS INCONSISTENT WITH THE PURPOSES OF SECTION 7(a)(2) AND THE CENTRAL ROLE OF THE INTERAGENCY CONSULTATION PROCESS IN RESOLVING APPARENT CONFLICTS

A. The Purposes Of The ESA Would Be Frustrated By EPA's Contention

EPA's effort to create an exception not found in the plain language of Section 7(a)(2) would frustrate the purposes of the ESA. Those purposes are to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and a "program for the conservation of such ... species." 16 U.S.C. §1531(b). The purpose of "conserving" such species can only be met by "bring[ing] any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary," *i.e.*, to the point at which a species has recovered and can be removed from the official list of such species. *Id.* §1532(3).

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[8] It is also unclear whether *Platte River* even dealt with Section 7(a)(2). In a pivotal sentence, the DC Circuit reasoned that "the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." 962 F.2d at 34 (emphasis in original). However, the phrase "utilize their authorities" appears only in Section 7(a)(1), 16 U.S.C. §1536(a)(1), which imposes affirmative duties of federal agencies to further the conservation of listed species. Whether or not Section 7(a)(1) expands agency powers is irrelevant to Section 7(a)(2) which clearly restricts *how* federal agencies carry out the activities they are empowered to undertake.

Section 7(a)(2) is central to these purposes for several reasons. First, it is the ESA's *only* mechanism for ensuring against the destruction or adverse modification of areas designated as "critical habitat" because they are "essential to the conservation" of a listed species. 16 U.S.C. §1533(5). When Congress enacted the ESA, critical habitat was one of its innovations, and yet the only regulatory consequence that attaches to critical habitat does so through Section 7(a)(2). Second, for plants, which comprise most of the listed species in the United States,[9] Section 7(a)(2) is generally the *only* significant mechanism in the ESA to guard against deleterious activities.[10]

Finally, that Congress viewed Section 7(a)(2) as critical to accomplishing the ESA's goals is evident from the extraordinary procedures required to secure relief from it. Whereas the taking prohibition in Section 9 can be waived simply by means of a permit issued by the Service for any "otherwise lawful activity," 16 U.S.C. 1539(a)(1)(B), waiver of the prohibitory duties of Section 7(a)(2) is only available in the event of a Presidentially declared major disaster, 16 U.S.C. §1536(p), a finding of the Secretary of Defense that a waiver is "necessary for reasons of national security," 16 U.S.C. §1536(j), or as a result of a determination on the record by a super-majority of a specially constituted committee of Cabinet-level officials that the activity for which the waiver is sought "is of regional or national significance" and has no reasonable and prudent alternative. 16 U.S.C. §1536(h). No other duty imposed by any other

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[9] See http://ecos.fws.gov/tess_public/Boxscore.do (visited March 18, 2007). As of March 18, 2007, of the 1310 endangered or threatened species in the United States, 744 were plants.

[10] Although Section 9 of the ESA, 16 U.S.C. §1538, broadly prohibits the "taking" of endangered fish or wildlife, this prohibition does not extend to plants. Instead, plants are afforded substantially less protection. Compare 16 U.S.C. §1538(a)(1)(B) with 16 U.S.C. §1538(a)(2)(B).

provision of the ESA requires such extraordinary procedures to secure an exemption from it, yet EPA's contention would effectively exempt an entire class of federal activities of indeterminate scope[11] from this core requirement of the ESA.

To achieve the far-reaching purposes of the ESA, Congress was as encompassing and inclusive as it possibly could have been throughout the law. For example, there are no limitations on the plants and animals potentially subject to the ESA's protection. They include "any member of the animal kingdom, including without limitation any mammal, fish, bird ..., amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate," as well as "any member of the plant kingdom." 16 U.S.C. §1532(8) and (14). By including all invertebrates and plants, Congress went well beyond any earlier federal conservation law. M. Bean, *The Evolution of National Wildlife* Law (1st ed. 1977) at 445-46. Neither are there are any limitations on the persons subject to the ESA's requirements. They include an exhaustive list of natural, corporate, and governmental "persons" as well as "any other entity subject to the jurisdiction of the United States." 16 U.S.C. §1532(13). There are no limitations on the federal agencies subject to the ESA's duties. They include "any department, agency, or instrumentality of the United States," regardless of whether they manage land or have other environmental responsibilities. *Id.* §1532(7).

Like the examples just cited, Section 7(a)(2) is similarly all-encompassing, applying to "each federal agency" and to "any action authorized, funded, or carried out" by that agency. Here, however, the government contends that when Congress said "any action," it really meant "some actions."

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[11] As EPA itself notes, "it may require significant factual or legal analysis to determine whether a potential effect on listed species is properly attributable to an action mandated by Congress or to a related discretionary judgment." EPA Br. at 44.

That contention is not only contrary to the plain meaning of Section 7(a)(2), but would frustrate the far-reaching purposes of the ESA by excluding from its reach an expansive category of federal actions.

B. EPA's Position Undermines the Pivotal Role That Congress Intended the Interagency Consultation Process to Play in Resolving Seeming Conflicts

1. The Role of the consultation process is not simply to identify potential conflicts, but to seek out ways to avoid them, which it has largely done successfully.

Compliance with the prohibitory duty of Section 7(a)(2) is facilitated through a process of "consultation" between the "action agency" that authorizes, funds, or carries out the action and the Service. Consultation is not simply a means of determining whether a federal action transgresses the statutory prohibition. It is also, and more importantly, a mechanism to explore fully the opportunity to reconcile seeming conflicts between the survival imperatives of affected species and the objectives of a particular federal action. Congress, particularly since its substantial revision of the consultation process in 1978, has regarded that process as the lynchpin to the success of Section 7.

When Congress enacted the ESA, Section 7 was one of its most significant changes from earlier legislation. M. Bean & M. Rowland, *The Evolution of National Wildlife Law* (3rd ed. 1997) at 199. From the beginning, Section 7's duties were to be accomplished "in consultation" with the Service. The original Act did not further elaborate on the nature of this consultation duty. In 1978 and 1979, following this Court's decision in *TVA v. Hill*, Congress emphatically affirmed the pivotal role that consultation was to play in the

workings of Section 7. Most importantly, the consultation process was to provide for a searching inquiry not only into the consequences of proposed federal actions, but also into any reasonable and prudent alternative that could avoid the prohibited impact of jeopardizing the continued existence of any listed species, or destroying or adversely modifying its critical habitat. See 16 U.S.C. §1536(b)(3) and (4). To ensure the integrity of the consultation process and to ensure that action agencies consulted in good faith, Congress prohibited them from making any irreversible or irretrievable commitment of resources that had the effect of foreclosing the formulation or implementation of reasonable and prudent alternative measures. ESA §7(d), 16 U.S.C. §1536(d). This requirement was taken directly from the Services' 1978 regulations, clear evidence that Congress was fully aware of them. See 50 C.F.R. §402.04(a)(3) at 43 Fed. Reg. 875 (Jan. 4, 1978).

The process by which federal agencies comply with Section 7(a)(2) is straightforward and can terminate at any of three stages: (1) upon a unilateral determination by the action agency that its proposed action will not affect any listed species or critical habitat; (2) upon a determination by the action agency, following "informal consultation," that its action is "not likely to adversely affect" any such species or habitat, provided the Service concurs therewith; or (3) upon issuance by the Service, following "formal consultation," of a biological opinion that evaluates whether the proposed action, or any reasonable and prudent alternative to it, complies with Section 7(a)(2)'s duty to insure no jeopardy to species or adverse modification of critical habitat. See 50 C.F.R. §402.14. In general, it has been extremely rare for any proposed federal action to proceed through all three steps of the compliance process only to meet with a negative biological opinion that identifies no reasonable and prudent alternatives within the authority of the action agency. The formal consultation process between action agencies and the Service has generally been quite successful in identifying

reasonable and prudent alternatives that allow action agency objectives to be met without jeopardizing the continued existence of listed species or adversely modifying their critical habitats.[12] Likewise, in the informal consultation process that comprises the second stage above, action agencies often adopt modifications or compensatory measures as part of their proposed actions to eliminate any likelihood that the actions will adversely affect listed species or critical habitat.

That, in fact, is what EPA did in *American Forest & Paper Ass'n v. United States EPA*, 137 F.3d 291 (5th Cir. 1998). In that case, EPA never got to the third step of the compliance process; it never formally consulted with the Service or secured from it a biological opinion that examined the proposed transfer of permitting authority to Louisiana. Instead, as the Fifth Circuit's opinion makes clear, "EPA devised" a scheme whereby, in exchange for transferring permitting authority to Louisiana, EPA secured the state's

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[12] The House report on the 1982 ESA amendments noted that "the consultation provisions have functioned extremely well as a means whereby potential conflicts between the conservation of [listed] species and the carrying out of Federal activities can be avoided." H.R. Rep. No. 97-567, at 24 (1982), *reprinted* in 1982 U.S.C.C.A.N. at 2824. During floor debate, Rep. Forsythe reported that "in the last 3 fiscal years ... there have been 10,762 consultations conducted under the Endangered Species Act. Of those, ... only 192, 1.8 percent, resulted in a finding that the project in question would jeopardize the continued existence of an endangered species. Of those 192 projects, modifications were made in 185 and they went forward. Only seven projects in 3 years were stopped, and I would point out that of those seven at least five, and perhaps all seven, were stopped for reasons unrelated to the Endangered Species Act." 128 Cong. Rec. 12958 (June 8, 1982). For similar, more recent statistics, see T. Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin*, vol. 24, no. 6 at 10-11 (Nov./Dec. 1999), www.fws.gov/endangered/esb/99/11-12/10-11.pdf (visited March 18, 2007).

consent that if the state failed to satisfy the Service's endangered species concerns with respect to particular permits, EPA would veto those permits. 137 F.3d at 294. EPA's adoption of this procedure was not the result of formal consultation with the Service, for there was none. Rather, "public comments ... prompt[ed] EPA to adopt" it. *Id.* at 296.

This procedural history of *American Forest* is important because it clarifies the issue that the Fifth Circuit actually had before it. EPA, *without benefit of formal consultation with the Service*, modified its original proposed action in a way that it thought would meet the "not likely to adversely affect" test of the second stage of the compliance process. The Fifth Circuit held that EPA's conditioning of its approval upon Louisiana's consent to the scheme described above exceeded EPA's statutory authority. However, because no formal consultation ever took place, EPA and the Service never undertook the exhaustive examination of *all* potential alternatives to reduce the likelihood of jeopardy that a formal consultation would have required. That the one measure chosen by EPA after informal consultation to justify its "not likely to adversely affect" determination exceeded its authority does not mean that there were no other permissible measures that might have been identified though formal consultation. Put differently, even if, as the Fifth Circuit asserted, "EPA lacks authority to modify the plain language of the CWA by adding to the list of enumerated requirements,"[13] there may be other measures EPA can

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[13] Id. at 298, n. 6. In reaching this conclusion, the Fifth Circuit reasoned that although CWA §402(b)(6), 33 U.S.C. §1342(b)(6), allows EPA to veto a state permit based on the Secretary of Army's concerns regarding anchorage and navigation, "Congress could have, but did not, grant EPA an analogous veto power to protect endangered species." Id. at 298. Regarding both this section and CWA §304(i), 33 U.S.C. §1314(i), which authorizes EPA to issue regulations governing the approval process for state programs, the court drew support for its conclusion from the fact

undertake that would satisfy the requirements of Section 7(a)(2). Indeed, it is the purpose of formal consultation to explore whether there are such alternatives. The Fifth Circuit opinion should not be understood to presuppose the outcome of a formal consultation process that had never occurred.

Yet, that is in effect the interpretation EPA advances here. Indeed, EPA goes beyond *American Forest* by asserting that the transfer of permitting authority to a state *never* need proceed past the first stage of the compliance process because such transfers do not meet the "may affect" test of that stage. That contention not only goes beyond *American Forest*, but it goes beyond any position previously taken by EPA in connection with any previous transfer of permitting authority.[14]

The practical consequence of the government's position that "non-discretionary" federal actions lie wholly outside the reach of Section 7(a)(2) is that any agency that thinks it has no discretion but to carry out an action will never get past Step One of the compliance process. There can be no serious doubt that TVA, for example, believed it had no discretion but to forge ahead with the completion of Tellico Dam.

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that "neither section even mention[s] endangered species or the ESA." Id. It would have been remarkably prescient had Congress done so, since the ESA had not yet been enacted.

[14] Although prior to 1993 the transfer of NPDES permitting authority was accomplished without consultation, the record does not reveal the basis for this fact. For 30 states, permitting authority was transferred either prior to enactment of the ESA or before there were any regulations implementing the Section 7 consultation process. As of 1993, however, following the significant expansion of the NPDES program caused by the requirement for stormwater discharge permits, EPA consulted on all transfers of NPDES permitting authority. For none of the pre-1993 transfers does the record reveal whether EPA made threshold "may affect" determinations or, if it did, what the basis for those determinations was.

Because Step One determinations are made unilaterally by action agencies that need neither notify nor solicit the views of the Service on those determinations, the rule advocated by the government here will create a powerful incentive for agencies to self-characterize their actions as non-discretionary and thus bypass the consultation process that Congress deemed central to accomplishing the purposes of the ESA.

2. EPA's position ignores the authorities it has that could reduce the likelihood of prohibited impacts

Petitioners make much of the fact that, as originally enacted, Section 7 required federal agencies to "utilize their authorities in furtherance of the purposes of" the ESA by "insur[ing] that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of listed species or destroy or modify their critical habitats. Petitioners assert that the reference to "utiliz[ing] their authorities" was intended by Congress to continue to apply to the duties now set forth in Section 7(a)(2), even though that language appears in Section 7(a)(1) and not in Section 7(a)(2). But *even if those words were part of Section 7(a)(2)*, they would not support the Petitioners' position here. Where Petitioners err is in construing those words confine the inquiry under Section 7(a)(2) to the precise authority for the action in question. Instead, they should be read less myopically to require inquiry into all of the authorities that an agency may have to reduce the likelihood of its action having a prohibited impact.

Even if the CWA requires EPA to approve the transfer of permitting authority to a state that meets the CWA criteria, and even if Section 7(a)(2) of the ESA confers no additional authority upon EPA to condition or qualify its transfer, the requirements of Section 7(a)(2) still apply to EPA's action. Unlike in *Public Citizen*, where no purpose would have been served by requiring FMCSA to prepare an

environmental impact statement explaining the effects of a decision already made, the requirements of Section 7(a)(2) are not nullified even if a particular decision is mandated, for they affect *how* that decision is carried out.

Applying the consultation requirement of Section 7(a)(2) here will serve the salutary intended purpose of exploring all means within EPA's authority to reduce the likelihood of jeopardizing the continued existence of any listed species. EPA's transfer decision, after all, triggers a continuing duty on it to oversee the administration of the state program. CWA §402(c), 33 U.S.C. §1342(c). Moreover, EPA may object to the issuance of individual permits that it deems to be "outside the guidelines and requirements" of the CWA. CWA §402(d), 33 U.S.C. §1342(d).[15] Consultation between EPA and the Service at the time of transfer can and should explore how EPA will exercise its oversight and permit objection authorities to reduce the likelihood that the continued existence of any threatened or endangered species will be jeopardized as a result of the transfer of NPDES authority. EPA and the Service might, for example, agree upon a special set of procedures they will jointly employ to provide special scrutiny to permits in particular areas, or permits associated with particular types of projects. Such special procedures could supplement EPA's general expertise with the Service's particular biological expertise regarding the requirements of

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[15] The regulations that implement Section 7(a)(2) define "Effects of the action" to include "direct and indirect effects of an action" as well as "the effects of other activities that are interrelated or interdependent with that action." "Interrelated actions" refer to "those that are part of a larger action and depend on the larger action for their justification." "Interdependent actions" refer to actions "that have no independent utility apart from the action under consideration." 50 C.F.R. §402.02. EPA's post-delegation oversight activities are interdependent upon its delegation action, inasmuch as they have no independent utility without the delegation.

listed species. Indeed, special procedures such as these were typically agreed upon as a result of the consultations that took place with respect to the six states to which permitting authority has been transferred since 1993.[16]

3. If a truly irresolvable conflict exists, the exemption process is the required means of addressing it.

EPA relies heavily upon *American Forest* for the proposition that Section 7(a)(2) merely "channels" existing agency authority in a particular direction. This description fundamentally mischaracterizes the role and function of Section 7(a)(2), which both guides how agencies carry out their various authorities and ultimately serves as a barrier to or restraint upon what federal agencies could otherwise do. *TVA v. Hill* did not "channel" TVA's authority into building dams with permanently open gates. Rather it prevented TVA from using its authority to close the gates on a nearly completed dam that threatened to extirpate an endangered fish.

Congress recognized, as a result of *TVA v. Hill*, that there would on occasion be situations in which no reasonable and prudent alternative to a proposed federal action meets the requirements of Section 7(a)(2). When such irresolvable conflicts exist, Congress established a special process by which federal actions that conflict with Section 7(a)(2) may

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[16] Petitioner National Association of Home Builders argues in its brief (p. 11) that when these consultations took place "EPA did not acknowledge that it was legally obligated" to consult, but was free to do so voluntarily. But what purpose does voluntary consultation serve unless, as a result of such consultation, steps are identified that would tend to reduce the likelihood of adverse impact to listed species? And if EPA can undertake those steps following voluntary consultation, it can do so as a result of consultation required by Section 7(a)(2).

be exempted therefrom. If EPA lacks the authority to implement any alternative that is consistent with Section 7(a)(2), it may proceed with its action only by securing an exemption through Section 7(h), 16 U.S.C. §1536(h).

Because the consultation process has almost always avoided irresolvable conflicts, the exemption process has rarely been used. Nevertheless, a seven-member "Endangered Species Committee" can grant exemptions if at least five of its members determine that the benefits of the action for which exemption is sought "clearly outweigh the benefits of alternative courses of action" that preserve the species. 16 U.S.C. §1536(h)(1)(A)(ii). Congress intended that in making this determination the Committee would consider alternatives *outside* the action agency's authority. As explained by Senator Culver, the floor manager in the Senate of the bill (S. 2899) that created the Committee, "[i]n reviewing available alternatives to the action under review, the committee would be charged to examine the benefits of all available alternatives, *not simply those which are within the agency's jurisdiction.*" 124 Cong Rec. S10896 (daily ed. July 17, 1978), *reprinted* in A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1978, 1979, and 1980 at 962-63 (1982, emphasis added). See also 50 C.F.R. §§450.01 and 453.03(a)(1)(ii) (Committee may consider alternatives, "including both no action and alternatives extending beyond ... acting agency jurisdiction"). Thus, even when an agency has no authority to do anything to avoid conflict with its duty to insure no jeopardy, it remains subject to Section 7(a)(2) and can avoid its restraining effect only by securing an exemption.

IV. EPA'S CONTENTION THAT NON-DISCRETIONARY FEDERAL ACTIONS ARE NOT SUBJECT TO SECTION 7(a)(2) WOULD HAVE UNANTICIPATED NEGATIVE CONSEQUENCES FOR FEDERAL AGENCIES

EPA's contention that non-discretionary actions are not subject to Section 7(a)(2) could have troubling ramifications for federal agencies generally. In particular, agencies and their officials carrying out putatively "non-discretionary" actions could be liable for civil or criminal penalties, or subject to injunction, for violating the ESA's taking prohibition without the authorization provided by Section 7(o)(2), 16 U.S.C. §1536(o)(2).

Those consequences stem from the interplay between Section 7(a)(2) and the prohibition against "taking" endangered fish or wildlife in Section 9(a)(1)(B), 16 U.S.C. §1538(a)(1)(B). As Justice Scalia noted in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 724 (1995), these provisions "do *not* operate in separate realms; federal agencies are subject to *both*, because the 'person[s]' forbidden to take protected species under [Section 9] include agencies and departments of the Federal Government." (Scalia, J., dissenting; emphases in original). Indeed, as Justice Scalia further noted in *Bennett v. Spear*, 520 U.S. 154, 172 (1997), an action agency that takes a listed species exposes its employees to "substantial civil and criminal penalties" because "persons" subject to the Act explicitly include not only agencies and departments of the Federal Government, but "any officer, employee, [or] agent" thereof. 16 U.S.C. §1532(13).

The fact that federal agencies are subject to both provisions prompted 1982 amendments that provided relief from the taking prohibition in certain circumstances. Congress's concern was expressed as follows in the House Committee Report:

> "After complying with the rigorous demands of the Section 7 consultation process, the applicant or Federal agency receives no assurance that any incidental and unintentional takings contemplated under a

> Section 7 consultation will not be prosecuted under Section 9 which prohibits any taking."

H. Rep. No. 97-567, 97th Cong., 2d Sess. at 15 (1982), *reprinted* in 1982 U.S.C.C.A.N. 2815; see also S. Rep. No. 97-418, 97th Cong., 2d Sess. at 21-22 (1982). Congress remedied this dilemma with amendments embodied in Section 7(b)(4) and 7(o)(2), 16 U.S.C. 1536(b)(4) and 1536(o)(2). The former provides that if the Service concludes, after consultation, that the federal action would not violate Section 7(a)(2) but may result in the incidental taking of a listed species, the Service must include in its biological opinion "reasonable and prudent measures" to minimize the impact of such incidental taking. The latter provides that any taking that is in compliance with such reasonable and prudent measures shall not be considered a prohibited taking.

Unless federal actions undergo formal consultation, there may be no means of securing for them relief from the ESA's taking prohibition. Section 10(a)(1)(B) of the ESA, 16 U.S.C. 1539(a)(1)(B), authorizes permits to take listed species incidental to otherwise lawful activities, but it is well established that permits under this provision are not available to federal agencies.[17] Section 7(b)(4) and Section

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[17] In explaining the new permitting provision of Section 10(a)(1)(B) in 1982, the House floor manager of bill characterized it as "involv[ing] permits for the taking of endangered species when no other Federal action is involved." 128 Cong. Rec. 26188 (Sept. 30, 1982, remarks of Rep. Breaux). Under the heading, "Who Can Apply for a Section 10 Permit?" the Services' *Habitat Conservation Planning Handbook* , available at www.fws.gov/endangered/hcp/hcpbook.htm (visited March 21, 2007), explains that "Section 10 permits can be issued to state, municipal, or tribal governments, corporations or businesses, associations, and private individuals. They can be issued to entities that are a combination of these, such as joint power authorities, watershed councils, and other planning authorities." Handbook at 3-1. In short, Section 10(a)(1)(B)

10(a)(1)(B) thus provide mutually exclusive mechanisms to authorize incidental take: the former for federal actions and the latter for non-federal actions. The idea that there might be some federal actions not subject to Section 7 – *i.e.*, those EPA characterizes as non-discretionary – clearly never occurred to Congress. If EPA's view is correct, then federal agencies can never secure authorization to take listed species when carrying out non-discretionary actions, because those actions cannot be the subject of a biological opinion – the only mechanism by which federal agencies can receive authorization for such take. That Congress never contemplated such an inexplicable result is certain, yet it is precisely the result that flows from the legal proposition that EPA asserts here.

CONCLUSION

The judgment below should be affirmed and the case remanded for further proceedings consistent with the requirements of Section 7(a)(2) of the ESA.

Respectfully submitted.

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March 27, 2007

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permits are available to anyone except federal agencies. The Handbook continues: "The standard method for authorizing take for Federal agencies is through the Section 7 consultation process. Actions authorized, funded, or carried out by Federal Agencies *must go through the Section 7(a)(2)consultation process*" (emphasis added). *Id.* at 3-1 to 3-2.

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Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether the Environmental Protection Agency ("EPA") "authorizes" and is the legal cause of effects of private land use activities, within the meaning of § 7(a)(2) of the Endangered Species Act ("ESA") where § 402(b) of the Clean Water Act ("CWA") does not allow EPA to consider effects on ESA-listed species in transferring CWA permitting authority to a State, and where the direct cause of such effects is a private land use initiative which requires some State-issued permit.

2. Whether the panel below improperly mandated a construction of ESA § 7(a)(2) where that construction is not the only permissible interpretation of the ESA, is contrary to the agencies' interpretation of a statute and rules they administer, and is not compelled by *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae American Farm Bureau Federation ("AFBF")[1] is a voluntary general farm organization. AFBF represents more than five million member families through member organizations in all 50 States and Puerto Rico.

The Ninth Circuit found that § 7(a)(2) of the Endangered Species Act ("ESA")[2] overrides the mandate of Clean Water Act ("CWA") § 402(b), 33 U.S.C. 1342(b), to "approve" a State's proposed National Pollutant Discharge Elimination System ("NPDES") permitting program if nine specified criteria are satisfied. *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005), *reh'g denied*, 450 F.3d 394 (9th Cir. 2006) ("*Defenders*") (Fed. Pet. App. 1a-67a, 68a-92a). Because State program approval has the effect of transferring NPDES permitting authority from EPA to the State, under the ruling below, EPA now must either continue to issue federal permits for CWA discharges in Arizona or find ways to ensure that Arizona "voluntarily" will meet EPA's asserted § 7(a)(2) duties. *Id.* at 977 (Fed. App.59a-60a).

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than AFBF, its members, and its counsel made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All parties other than the United States submitted letters to the Court consenting to the filing of all *amicus curiae* briefs. The consent of the United States has been filed with the clerk.

[2] ESA § 7(a)(2) provides: "Each Federal agency shall, in consultation with and with the assistance of the Secretary [who acts through the U.S. Fish and Wildlife Service or National Marine Fisheries Service (the "Service")] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species ["listed species"] or result in the destruction or adverse modification of designated critical habitat." 16 U.S.C. 1536(a)(2).

AFBF members are directly affected by the questions presented here. AFBF's membership includes operators of all species of livestock farms subject to NPDES regulation as "concentrated animal feeding operations." *See* 33 U.S.C. 1362(14); 40 C.F.R. 122.23. These members would face increased procedural and substantive regulatory burdens under the Ninth Circuit's view that ESA § 7(a)(2) overrides the directives of the CWA.

More generally, the Ninth Circuit's reasoning "would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* agency." *Defenders*, 450 F.3d at 398-99 and n.4, 401 (Kozinski, J., dissenting from denial of rehearing) (Fed. App. 69a, 74a-79a, 82a). Acceptance of the Ninth Circuit's logic thus would undermine the ability of federal agencies to promptly issue any number of permits, loans, insurance, or other government services under the standards specified in the organic law for each program. Many AFBF members rely on such federal programs or services. Hence, they have substantial interests in the reversal of the decision below.

SUMMARY OF ARGUMENT

The split panel opinion in *Defenders* found that ESA § 7(a)(2) overrides the explicit commands of other statutes. Here, § 7(a)(2) was read to negate CWA § 402(b)'s directive that EPA "shall approve" a State's NPDES permitting program if nine exclusive criteria are satisfied. This aspect of the opinion is incorrect for many reasons.

First, in this setting, no "action authorized, funded, or carried out by" EPA proximately causes impacts to listed species that might trigger ESA § 7 duties. Rather, any such impacts would be caused by private land use activities regulated by the State of Arizona. To the extent that EPA's "approval" of a State's NPDES permitting program would have a "but for" causal relationship to subsequent species impacts, the *legally relevant* cause nevertheless is the action of Congress. Congress limited EPA's discretion and directed in CWA § 402(b) that EPA "shall approve" State programs that meet specified requirements.

Second, the implementing agencies have concluded that § 7 applies only if the federal action agency has discretionary authority under its organic laws to modify its action based on wildlife concerns. Courts owe *Chevron* deference to the agencies' interpretation of ESA § 7 and *Auer* deference to the agencies' interpretation of rules like 50 C.F.R. 402.03. That deference is determinative here because the agencies' interpretation of ESA § 7 is permissible. For example, as ESA § 2(c) and § 7 as originally adopted only instruct federal agencies to "utilize their authorities" to protect listed species, the agencies can permissibly conclude that ESA § 7(a)(2) does not require action in *contravention* of the directives of an agency's organic laws. As in another ESA decision, a conclusion that "the Secretary's interpretation is reasonable suffice[s] to decide this case." *Babbitt v. Sweet*

Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 703 (1995).

Third, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), does not bar the agencies' interpretation of ESA § 7. As the existence of an ESA § 7 violation was conceded in that case, the Court's opinion did not express a holding on § 7. The *dicta* in *TVA v. Hill* concerned distinct issues and did not address what the law would be if TVA were acting under a statutory obligation to close the dam gates. Further, *TVA v. Hill* includes favorable *dicta* that ESA § 7 describes the "obligation of [federal] agencies to *take steps within their power* to carry out ESA objectives. 437 U.S. at 182-84 (emphasis added). Since ESA § 7 allows the agencies' interpretation, even if *dicta* in *TVA v. Hill* provides some support for the Ninth Circuit's conclusion, the agencies' view should be upheld. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-82 (2005).

ARGUMENT

I. ESA § 7(a)(2) Operates Within a Federal Agency's Range of Discretion Under Its Organic Laws

The principal question presented is whether ESA § 7(a)(2) overrides the directives and limitations of other federal statutes. The view of the United States and the agencies implementing § 7, as codified at 50 C.F.R. 402.03 and 402.16, is that ESA § 7(a)(2) operates only to the extent that a federal agency has discretion to act in favor of listed species under its organic laws. The view adopted by the court below is that ESA § 7(a)(2) constrains, and provides new authority governing, every federal agency action – even in contravention of those laws.

Many statutes direct federal agencies to issue permits, grants, insurance, or other benefits if a prescribed set of

standards is satisfied. Under the panel majority's ruling, ESA § 7(a)(2) *bars such action*: (1) procedurally, until the federal agency completes "consultation" with the relevant Service (here, the U.S. Fish and Wildlife Service ("FWS")); and (2) substantively, unless the agency can "insure" that the action Congress directed in another statute is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. *Defenders*, 420 F.3d at 961-69 (Fed. App. 26a-44a). That view "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute." *Defenders*, 450 F.3d at 398 (Fed. App. 74a) (Judge Kozinski, dissenting from denial of rehearing).

Here, it was uncontested that Arizona satisfied the nine exclusive criteria Congress specified in CWA § 402(b). In those circumstances, § 402(b) commands that EPA "shall approve" a State's application to administer its own NPDES program. 33 U.S.C. 1342(b). The opinion below reads ESA § 7(a)(2) to negate that legislative directive. The Ninth Circuit's view is not persuasive.

1. ESA § 7(a)(2) concerns solely the effects of an "action authorized, funded, or carried out by" a federal agency. 16 U.S.C. 1536(a)(2). Biological opinions prepared in some consultations address "how the agency action *affects* the species or its critical habitat." *Id.* § 1536(b)(3) (emphasis added); *see* 50 C.F.R. 402.14. Thus, one way to look at the interpretive issue is: what "[e]ffects" are caused by "action authorized, funded, or carried out" by EPA when EPA approves a State NPDES permitting program pursuant to CWA § 402(b)? The court below failed to properly analyze the relevant *action* "authorized, funded, or carried out" by EPA and the *effects* "proximately caused" by that action.

a. EPA "shall approve" a qualified State NPDES permitting program. 33 U.S.C. 1342(b). After EPA approval of the program, the State (and not EPA)[3] may – or may not – issue NPDES permits for pollutant discharges within the State's borders. *See id.* § 1342(b)-(c); *see also* § 1319(a)(1)-(3). EPA has little discretionary control over this approval, which amounts to a certification that the State's program meets a specific list of statutory requirements. *Id.* § 1342(b). Nor can EPA, after approval, either require or prohibit the issuance of permits by the State, provided such permits meet all applicable CWA guidelines and requirements. *Id.* § 1342(c), (d).

The relevant "action" that EPA "carries out" under CWA § 402(b) is the "approval" of the State program, but that action "authorizes" no polluting activity or impacts to listed species. Future pollutant discharges – which may or may not be authorized pursuant to *State-issued* NPDES permits – are not "authorized, funded, or carried out" by EPA in any rational sense of those words. Therefore, they cannot be the relevant "action" under ESA § 7.[4] Moreover, while EPA's CWA § 402(b) approval is a necessary *prerequisite* to a State's implementation of its own NPDES permitting program, EPA cannot be said to "authorize" the State's future permit issuance where that power is conferred

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[3] EPA's permitting authority is automatically suspended 90 days after submittal of a proposed State program. 33 U.S.C. 1342(c).

[4] *Accord Marbled Murrelet v. Babbitt*, 111 F.3d 1447, 1450 (9th Cir. 1997) (where a State, not federal, agency "has the discretion to influence the private action," there is no federal "'agency action' under § 7 of ESA"). EPA's "action" under CWA § 402(b) is complete when the transfer occurs. Hence, there is no continuing federal action under CWA § 402(b) that is subject to ESA § 7(a)(2). *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

directly by Congress in the CWA itself and is implemented pursuant to independent State law. *See* 33 U.S.C. 1342(b)-(c). Thus, even to the extent that State permit issuance is "authorized" (i.e., made lawful) under CWA § 402(b), it is not "authorized" by EPA and, therefore, is not the relevant EPA "action" for ESA § 7 purposes.

b. Causation concepts under the National Environmental Policy Act, 42 U.S.C. 4332 ("NEPA") and the ESA are nearly identical for two reasons. First, NEPA and ESA rules only make the federal agency responsible for the direct or indirect effects "caused by the action." 40 C.F.R. 1508.8; 50 C.F.R. 402.02 (definition of "effects of the action"); *see id.* § 402.14(g) and (h)). Second, this Court has limited NEPA and ESA "causes" to "proximate causes." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767-79 (2004); *Sweet Home*, 515 U.S. at 697 n.9 & 700 n.13. "Proximate cause" means the "direct cause . . .; producing cause; [or] primary cause" and refers to the "cause that directly produces an event." BLACK'S LAW DICTIONARY "Cause" 234 (8th ed. 2004).

In *Public Citizen*, this Court distinguished the impacts caused by *agency* action (which must be analyzed in a NEPA document) from the *impacts proximately caused by other branches of government* (there, the President and Congress, and, here, the Congress). *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). The Court found that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." 541 U.S. at 767. Instead, the Court returned to the "familiar doctrine of proximate cause from tort law" to "draw a manageable line between the causal changes that may make an actor responsible for an effect and those that do not." *Id.*

According to the Court, the "legally relevant cause of entry of the Mexican trucks [into the U.S., possibly resulting in greater air pollution] is *not* [the agency's] action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority by limiting [the agency's] discretion." 541 U.S. at 769. "Since [the Federal Motor Carrier Safety Administration] has no ability to categorically prevent the cross-border operations of Mexican motor carriers," the agency "simply lacks the power to act on whatever information might be contained in the EIS" on air pollution impacts and cannot be forced to consider in depth the "environmental impact of an action it could not refuse to perform." 541 U.S. at 768-69.

Similarly, this Court has limited ESA "causes" by "ordinary requirements of proximate causation," emphasizing that "proximate cause" is narrower than "but for" causation.[5] Hence, *Public Citizen* and *Sweet Home* strongly support that EPA's NPDES program approval is not the legally relevant cause of the effects on listed species that may follow after subsequent State issuance of an NPDES permit, because EPA lacks responsibility for the effects of "action it could not refuse to perform." 541 U.S. at 768-69. *See also id.* at 767 ("proximate cause analysis turns on policy considerations and considerations of the 'legal responsibility' of actors"). Judge Kozinski's analysis, in

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[5] *Sweet Home*, 515 U.S. at 697 n.9 & 700 n.13; *see id.* at 708-15 (O'Connor, J., concurring). *Sweet Home* narrowly construed FWS's rule on the "harm" form of an ESA § 9 wildlife "take" (*e.g.*, the limit to "proximate cause") and sustained the rule under that construction. Surprisingly, the Ninth Circuit did not mention *Sweet Home* and reasoned that a "'but-for' causal chain" is the "obvious cause analysis." *Defenders*, 420 F.3d at 961-62 (Fed. App. 27a-28a). The Ninth Circuit does not seem to have accepted this Court's teachings that but-for causation is insufficient in many settings.

dissent, is persuasive that the "holding in *Public Citizen* applies equally to this case: Because EPA had no discretion under the CWA to decline to transfer NPDES permitting authority to Arizona, it did not need to consider the transfer's potential effects on endangered species."[6]

c. Further, EPA cannot be the legal cause of *non-water quality impacts* to listed species that might be associated with some private land use activities that also require a State-granted NPDES permit. The CWA only provides jurisdiction over water quality issues within waters of the United States. Hence, both EPA and States lack CWA authority to control impacts to listed species that do not involve water pollution.[7] "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen,* 541 U.S. at 770. Accordingly, the agencies correctly found that, when EPA approves a State program under CWA § 402(b), the potential non-water quality impacts of future

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[6] *Defenders*, 450 F.3d at 399 (Fed. App. 77a). Even an attorney sympathetic to Respondents' views has stated *Public Citizen* "suggests the opposite outcome from the one reached by the *Defenders* majority. If the agency lacked authority under the CWA to deny a transfer application, then its decision would not be the 'cause' of any harm that resulted. The [*Defenders*] court did not explain this apparent contradiction." Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 STAN. ENVTL. L. J. 125, 193 and n.309 (2006).

[7] *See Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000); *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 859 F.2d 156, 169-71 (D.C. Cir. 1988); *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 326-37 (5th Cir. 1980).

permitted activities do not trigger ESA § 7 duties. *See* NAHB App. 114.

EPA's approval of a State program as directed by CWA § 402(b) also is not the proximate cause of any adverse *water quality impacts* to listed species that may result from permitted activities. Any such impacts are directly produced or proximately caused by private decisions to utilize land and other resources in a given way. Further, only the *discharge* associated with those private activities is subject to CWA regulation, and the permit issuer is the State under State law – not EPA. EPA's remoteness from, and inability to control in its CWA § 402(b) approval, impacts to listed species mean that EPA is not a legal cause of those impacts. *See* NAHB App. 113-15 (analysis in FWS's biological opinion); Fed. App. 95a-110a (EPA's and FWS's subsequent clarification).

In sum, EPA is not a "proximate cause" of any impacts to listed species that may be caused by private development that is supported by a State-issued NPDES permit. If any federal action constitutes a "proximate cause" of those potential impacts, it can only be the *action of Congress*. Congress: (1) established in the CWA a strong policy in favor of State administration (33 U.S.C. 1251(b)); (2) directed in CWA § 402(b) that EPA "shall approve" State programs under specified conditions; and (3) limited ESA § 7(a)(2) to the "[e]ffects" of actions "authorized, funded, or carried out" by a "Federal agency" (16 U.S.C. 1536(a)(2), 1536(b)(3)), and did not include the effects of State actions.[8]

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[8] FWS so interpreted the statutes in its contemporaneous biological opinion, as did EPA in the "elevation" document. NAHB Pet. App. 113-15, 563-65; *see Defenders*, 420 F.3d at 953-54, 960-61 (Fed. App. 9a-11a, 25a-27a). EPA and the Services subsequently reaffirmed that interpretation in documents considered at high agency levels. *See* Fed. App. 93a-116a.

d. Because any causation discussion by this Court could have implications in other ESA contexts, a few general principles bear mention.

In important senses, while agencies partially regulate private land use and other activities, at least with respect to being a "cause" of "take" within the meaning of ESA § 9(a)(1) and (g), 16 U.S.C. 1538(a)(1) and (g), regulatory agencies are not proximate causes of the impacts of private land uses.[9] Under the Fifth Amendment, a landowner may make any non-noxious use of private lands. Hence, regulatory exercises of the police power constrain, but are not necessary to "authorize," private land uses.[10] For similar reasons, State-regulated private action is not "State action" for Fourteenth Amendment purposes.[11] Additionally, a

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[9] Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 429 (2005); James Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 625-26 (2003).

[10] *E.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-30 (1992); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-17 (1922) ("Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed.").

[11] The "State action" question encompasses a causation aspect: "whether the allegedly [unlawful] conduct is fairly attributable to the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). "Action taken by private entities with the mere approval or acquiescence of the State is not state action." 526 U.S. at 52. "[W]here the commission has not put its own weight on the side of the proposed practice by ordering it," a regulated utility's practice is not State action caused by a State. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974).

sovereign's decision to not regulate more strictly "cannot be the threshold for legal or proximate cause."[12]

e. EPA does have oversight roles over State NPDES permit issuance and program administration under 33 U.S.C. 1342(c) and (d). EPA may – or may not – object to State-issued permits for a variety of reasons related to compliance with CWA requirements. Under both the ESA and NEPA, claims of unlawful agency inaction fail without some "*discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 61-65; *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1107 (9th Cir. 2006) (an agency's "failure to exercise discretion . . . is [not] an 'agency action' for purposes of section 7(a)(2), so as to require consultation"). More generally, partial federal funding and oversight of a State program often do not federalize State

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[12] "If it were, the United States would be a 'cause' of contamination in every CERCLA action because the federal government always could have enacted legislation regulating industrial activity." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1275 (E.D. Cal. 1997). In an analogous area, commentators reject the theory that inadequate regulation makes a State regulator a culpable cause of "take." They do so on grounds of causation, the ESA's text, and under cooperative federalism principles under the ESA and Tenth Amendment. *See* Adler, 90 IOWA L. REV. 429-30; Rasband, 33 ENVTL. L. at 623-28; Valerie Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations Under the ESA*, 45 NAT. RES. J. 103 (2005); J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RES. & ENV'T 70 (ABA Fall 2001); Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L. J. 423, 438-54 (2000). While a comparison of the language of ESA § 7(a)(2) with that of § 9(a)(1) and (g) may produce slightly different analyses on proximate causation, we wish to make the Court aware of the ESA § 9 issues regarding who is a legally culpable "cause" of "take."

actions. *Forsham v. Harris*, 445 U.S. 169, 178-80 (1980); *United States v. Orleans*, 425 U.S. 807, 816-18 (1976). Hence, EPA's oversight should not transform a State-granted NPDES permit into federal "agency action" within the meaning of ESA § 7(a)(2).

2. The history of ESA § 7 confirms the federal agencies can permissibly construe § 7(a)(2) as operating within the boundaries of an agency's authority under its organic laws. ESA § 2(c)(1) states the "policy of Congress that all Federal departments and agencies shall . . . utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. 1531(c)(1). The "utilize their authorities" language strongly supports the view that ESA § 7 *supplements* where an agency's organic laws allow consideration of wildlife matters, but *does not supplant* limitations and directives in those organic authorities.[13]

Indeed, that was the clear intent of ESA § 7 as enacted in 1973. ESA § 7 then consisted of two sentences and no subsections. The second sentence provided: "Federal departments and agencies shall, in consultation with . . . the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out ["conservation"] programs . . . and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not

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[13] The "utilize their authorities" phrasing in ESA § 2(c)(1) and § 7 is similar to the phrase that NEPA applies "to the fullest extent possible." 42 U.S.C. 4332. Thus, there is a close analogy between NEPA and the ESA. This Court has construed the NEPA phrase to mean, "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976) (because the Disclosure Act compels federal approval within 30 days, no EIS is required under NEPA).

jeopardize the continued existence of" listed species or adversely modify critical habitat. 87 Stat. 884, 892 (1973). The House manager described that § 7 of the Conference bill "substantially amplifie[s] the obligation of [federal agencies] to *take steps within their power* to carry out the purposes of this act."[14] Thus, as originally adopted, what eventually became ESA § 7(a)(2) only required that federal agencies "utilize their authorities" to "insure" against extinction of listed species, where the agency's organic laws provided relevant discretion.[15]

It is true that the 1973 ESA removed qualifiers from predecessor statutes and from bills to the effect that agencies should preserve listed species only "insofar as is practicable and consistent with the[ir] primary purposes." *TVA v. Hill*, 437 U.S. at 181-82. In that sense, the ESA gives "endangered species priority over the 'primary missions' of federal agencies." 437 U.S. at 185. But this can be

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[14] 119 Cong. Rec. 42,913 (Dec. 20. 1973) (remarks of Rep. Dingell) (emphasis added), quoted in relevant part in *TVA v. Hill*, 437 U.S. at 184-85. Rep. Dingell cited as an example that, "[u]nder existing law, the Secretary of Defense has some *discretion*" on whether to conduct "bombing activities" in "whooping crane" habitat so, under the ESA, the "Secretary of Defense would be required to take the proper steps." *Id.* (emphasis added). In Rep. Dingell's other cited example (concerning grizzly bears), the National Park Service and Forest Service also had discretion to protect wildlife values. *See id.*; 16 U.S.C. 1, 528.

[15] The Conference Report adopted the provisions in §§ 2(c) and 7 of H.R. 37 that federal agencies shall "utilize their authorities." As that phrasing is not contained in the Senate-passed version of § 7, the Senate debates do not address § 7 as enacted. Still, § 2(b)(4) of S. 1983 stated the purposes of the Act included to "insure that all [federal] departments . . . seek, *within the scope of their authority* and administrative jurisdiction, to protect endangered and threatened species." 119 Cong. Rec. 25,694 (July 24, 1973) (emphasis added).

comfortably read as merely meaning that, where a federal agency's primary statutory duty also allows consideration of wildlife matters, ESA § 7 gives priority to avoiding the extinction of listed species.

That is a different question from the one presented here: where a statute *precludes* action based on wildlife concerns, does ESA § 7 negate that statutory limit? The answer to the presented question is "no" under the better reading of the 1973 ESA. The holding and essential logic of *TVA v. Hill* do not dictate otherwise. *See* pages 20-23, below.

After *TVA v. Hill*, through ESA amendments enacted in 1978 and 1979, Congress broke apart the long second sentence in § 7, forming what is now § 7(a)(1) and § 7(a)(2). The "utilize their authorities" language followed its closer antecedent into the "conservation" provision in 16 U.S.C. 1536(a)(1). We assume that Petitioners will again show that the absence of "utilize their authorities" in current § 7(a)(2) does *not* reflect a legislative intent to *expand* the scope of that provision. *See* Fed. Pet. at 14-17.

An intent to expand the stringency of § 7(a)(2) should not be read into the 1978 and 1979 amendments for at least three reasons. First, the amendments maintained the "policy of Congress" that federal agencies "utilize their authorities in furtherance" of ESA purposes. 16 U.S.C. 1531(c)(1).

Second, the 1979 ESA amendments *reduced* the § 7(a)(2) compliance standard. Hence, it would be illogical to infer an intent to increase the stringency or breadth of § 7(a)(2). The 1979 amendments moved § 7 from prohibiting a federal action unless the action agency could "insure" that the proposed action "do[es] not jeopardize the continued existence of a" listed species (87 Stat. 892 (1973)) to allowing an agency action to proceed if it is "not likely to

jeopardize" (16 U.S.C. 1536(a)(2)). The legislative intent was to allow more agency actions to pass muster under § 7.[16]

Third, some elements of the ESA exemption procedures added by the 1978 amendments would not make sense if § 7(a)(2) barred an action that is compelled by another statute. *E.g.*, 16 U.S.C. 1536(e)(3)(A)(i) (consideration of alternatives that are within an agency's range of authority, but would not violate § 7(a)(2)); *see* Fed. Pet. Reply at 5-6 n.1. Hence, the 1978 legislative intent can reasonably be

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[16] After *TVA v. Hill* described the potency of the enacted ESA, the 1979 Congress became concerned that ESA § 7 could be read as prohibiting federal actions unless the federal agency could insure there was no possibility of jeopardy. As Rep. Breaux stated in describing his adopted floor amendment:

> No matter how many precautions are taken, there may be a small chance that the agencies' action will end up jeopardizing the species. No agency can or should be expected to give a 100-percent guarantee of no adverse impact. I am concerned that the language of the existing statute ["insure . . . do not jeopardize"] could be interpreted to require this guarantee. The language I have proposed . . . allows Federal agencies to consider the probability or likelihood of jeopardizing a listed species in deciding whether to go ahead with a particular action.

125 Cong. Rec. 29,437 (Oct. 24, 1979).

The Conference Report noted the "not likely to jeopardize" phrasing "continues to give the benefit of the doubt to the species, and would continue to place the burden on the action agency to demonstrate . . . that its action will not violate Section 7(a)(2)." H.R. Conf. Rep. No. 96-697 at 12, 1979 U.S.C.C.A.N. 2572, 2576. Still, the ESA § 7(a)(2) "benefit of the doubt" was narrowed. It does not resolve all small risks of jeopardy in favor of listed species, but only risks near 50%. Only then could a federal agency not make a "not likely to jeopardize" finding. There should not be "negative biological opinions [finding jeopardy] whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize" the species. *Id.* Thus, Congress moved in the direction that less certainty is required to comply with ESA § 7(a)(2).

read as providing, in the Endangered Species Committee provisions, *another* exemption from ESA § 7. The 1978 amendments do not undercut Petitioners' position that, from the beginning, ESA § 7(a)(2) also exempted actions where the federal agency lacked discretion under its organic laws to act on the basis of wildlife concerns.

3. The court below, in parsing ESA § 7(a)(2), gave unwarranted weight to the word "insure." The panel majority rationalized that to "insure" is to "make certain" and, unless § 7(a)(2) is read to supply "authority to take measures necessary to prevent harm to endangered species, it is impossible for that agency to 'make certain' that its actions are not likely to jeopardize those species." *Defenders*, 420 F.3d at 963-64 (Fed. App. 31a-32a).

That rationale has an *ipse dixit* quality. Further, it plucks one word from its ESA § 7 context – ignoring other pertinent provisions, like "utilize their authorities" (discussed above) – and imposes an unusual meaning on "insure."

The dictionary meaning of "insure" is to "make certain." Thus, "insure" concerns the *level of certainty* for substantive compliance with § 7(a)(2), not whether § 7(a)(2) overrides limitations Congress stated in other laws. The 1979 Congress used "insure" in precisely this sense, when it reduced the level of certainty for § 7(a)(2) compliance.[17]

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[17] *See* note 16, and accompanying text. In particular, Rep. Breaux stated the "act currently requires Federal agencies to insure that any action does not jeopardize listed species." 125 Cong. Rec. 29,437 (Oct. 24, 1979). His amendment alters the certainty suggested by "insure" so that federal agencies are "to insure that their actions are 'not likely' to jeopardize" listed species" as "[n]o agency can . . . give a 100 percent guarantee." *Id.*

4. This Court's precedents call for deference to the implementing agencies' interpretation of ESA § 7 and to FWS's interpretation of its regulations.

ESA § 7 rules provide that "Section 7 and the requirements of this part apply" only to "actions in which there is *discretionary* Federal involvement or control," and consultation might be reinitiated only "where *discretionary* federal involvement or control has been retained or is *authorized by law*." 50 C.F.R. 402.03, 402.16 (emphasis added). The most natural reading of these provisions is that § 7(a)(2) applies only when an agency has discretion under its organic laws to modify its action due to wildlife effects.

The panel majority, however, improperly construed § 402.03 to add nothing.[18] After relying on "insure" and other rationales to conclude that ESA § 7(a)(2) can *only* be interpreted to establish an overriding authority and obligation paramount to any contrary statutory mandate, the panel then construed § 402.03 to be merely "coterminous with the statutory phrase . . . actions 'authorized, funded, or carried out' by a federal agency. *Defenders*, 420 F.3d at 967-69 (Fed. App. 39a-43a). The panel's construction of the rule thus allowed it to avoid addressing the conflict between the Service's interpretation of the statute (as embodied in the rule) and the court's own interpretation – and to avoid giving deference to the Service's entirely permissible view.

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[18] *See* Sherry Bosse, *Defenders of Wildlife v. EPA: Testing the Boundaries of Federal Agency Power Under the ESA*, 35 ENVTL. L. 1025, 1042-47 (2006). In Judge Kozinski's well-crafted words, "[u]nable to reconcile this regulation with its newly expansive interpretation of the ESA's mandate, the majority simply finds that the word 'discretionary' in the regulation is meaningless." *Defenders*, 450 F.3d at 398 (Fed. App. 75a).

FWS has now definitively articulated its interpretation of § 402.03 to mean that "Section 7 does not require agencies to act on grounds of species protection where the agency, . . . because of statutory limitations . . ., lacks legal discretion to do so." Fed. App. 110a. In this Court, FWS's interpretation of its own rule should be "controlling" as it is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

The statutory interpretation codified at 50 C.F.R. 402.03 and 402.16 deserved a less strained reading and at least some deference from the Ninth Circuit. It now warrants *Chevron* deference, as all the agencies implementing § 7(a)(2) have joined in that interpretation.[19]

The intended reach of ESA § 7(a)(2) is ambiguous in light of the "utilize their authorities" language, the absence of legal causation where agency discretion is lacking, and

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[19] The Services' construction of ESA § 7 in the 50 Part 402 rules, in isolation, might not warrant deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984). An agency must have delegated statutory authority before it can issue binding legal rules. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). The four Justices reaching the issue and the Solicitor General have concluded that the Services' "consultation" or "assistance" role under 16 U.S.C. 1536(a)(2) does not provide authority to issue ESA § 7 rules binding on the action agencies who seem to have the lead responsibility under ESA § 7's text. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-70 (1992).

Here, all the agencies that collectively implement ESA § 7(a)(2) have joined in the common interpretation that § 7(a)(2) does not apply and "does not expand EPA's authority to address the concerns of listed species where Congress has limited the Agency's ability to consider such concerns." Fed. App. 96a (EPA letter); *see, e.g.*, Fed. App. 108a (FWS response). That formal, uniform interpretation by all implementing agencies warrants deference under *Chevron*. *United States v. Mead Corp.*, 533 U.S. 218, 227-34 (2001).

other aspects of the statutory framework and history discussed above[20] The federal agencies can and have resolved that ambiguity in their interpretation of § 7(a)(2) and its implementing rules. Therefore, a conclusion that "the [agencies'] interpretation is reasonable suffice[s] to decide this case." *Sweet Home*, 515 U.S. at 703.

5. Another crucial rationale in the opinion below is that *TVA v. Hill*, 437 U.S. 153 (1978), "confirms th[e] textual interpretation" that ESA § 7(a)(2) supplies the agency "authority [and duty] to take measures necessary to prevent harm to endangered species." *Defenders*, 420 F.3d at 964 (Fed. App. 32a). Yet, that was *not* a holding in *TVA v. Hill*. While some *dicta* in *TVA v. Hill* arguably support the result below, other *dicta* and the lack of a pertinent holding leave ample room for the agencies' reasonable ESA construction.

TVA v. Hill did not express any holding interpreting § 7 because a violation of § 7 was conceded. 437 U.S. at 171-73. The questions before the Court were whether: (1) the legislative history of appropriations acts overrode § 7; and (2) courts could decline to grant an injunction where a future federal action (closing the Tellico Dam gates) was expected to directly cause the extinction of the snail darter. 437 U.S. at 156, 171-73, 184-95.[21]

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[20] "Nowhere in the legislative history of the ESA and its amendments is there any explicit discussion of the operation of § 7 on 'nondiscretionary' agency actions." Hasselman, 25 STAN. ENVTL. L. J. at 133.

[21] *TVA v. Hill* was an unusual case in many ways. It was briefed early in a new Administration under shifting signals. The government's brief provided TVA's position on the ESA in the main body, and FWS's opposite position in an appendix. *See* Rex E. Lee, *Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 27-28 (2003). *TVA v. Hill* was authored by

(continued....)

The Court answered "no" to both questions. Different questions are presented here. For example, "the Supreme Court never specifically addressed the question of whether TVA had the 'discretion' to not finish the dam. Nor did such an argument play a prominent role in the briefing before the court." Hasselman, 25 STAN. ENVTL. L. J. at 137 n.4.

Further, *TVA v. Hill* concluded that the *legislative history* of an appropriations act cannot override a substantive statute like ESA § 7. 437 U.S. at 189-93. *TVA v. Hill* did not address the issue here of what happens when substantive statute (like CWA § 402(b)) mandates specific action regardless of potential wildlife impacts. "*TVA*, which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out purposes of the ESA, is hardly authority to the contrary." *Platte River Whooping Crane Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33-34 (D.C. Cir. 1992).

Significantly, TVA was "carrying out" a *federal* dam project that would directly impact a listed species. 437 U.S. at 173-74 and n.18, 186-87 and n.32. The result may well be different here, where the only action "carried out" by EPA is the "approval" – more in the nature of a certification – of Arizona's NPDES program as compliant with CWA

(continued) . . .
Chief Justice Burger, who "initially voted in dissent," then "assigned himself the opinion for the Court, after it became clear that a majority of the justices were for affirming the Sixth Circuit." Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 416 (2006). The "undercurrent of skepticism places the Court's opinion much closer to the two dissenting opinions than might first appear." *Id.* Finally, at least one noted legal scholar has criticized the mode of legal analysis in *TVA v. Hill*. Ronald Dworkin, *Law's Empire* 20-23, 313-47 (1986).

§ 402(b) criteria. The later actions that may affect listed species would be private actions and State regulatory actions, not the federal actions to which ESA § 7(a)(2) applies.

More generally, much of *TVA v. Hill* is lengthy *dicta* and ESA background. It is "contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 n.5 (1992); *see United States v. Booker*, 543 U.S. 220, 239-41 (2005) (prior decisions regarding the Sentencing Guidelines did not establish precedent on issues "not [earlier] presented"). Hence, *TVA v. Hill* does not resolve this case.

Notably, some *dicta* in *TVA v. Hill* support Petitioners' view that ESA § 7 applies only within the limits of an agency's legal power:

> [T]he House manager of the bill, Representative Dingell, provided an interpretation of the Conference bill . . . "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to *take steps within their power* to carry out the purposes of this act."

437 U.S. at 182-84 (emphasis added). The snippets cited in the opinion below do not dictate the opposite conclusion.[22]

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[22] The panel rationalized that, when this Court stated ESA § 7's "very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded or carried out* by them do not *jeopardize*'" (437 U.S. at 173), the "affirmative command" must override other laws. *Defenders*, 420 F.3d at 964 (Fed. App. 32a-33a). This Court's observation that "insure . . . do not jeopardize" is an "affirmative command" does not resolve the distinct issue here of whether that command overrides contrary statutory directives.

The panel also cited from 437 U.S. at 184, 193-94 that the "plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost." *Defenders*, 420

(continued....)

It also is highly significant that *TVA v. Hill* was decided before the Services had adopted the regulations that ESA § 7 applies only to "discretionary" actions, and before *Chevron* and its progeny required greater judicial deference to agency interpretations of statutes and rules. As ESA § 7 allows the agencies' current interpretation, the agencies might even overrule an earlier judicial opinion favoring a different interpretation. *Brand X*, 545 U.S. at 980-86. Even if there have been inconsistent agency interpretations of ESA § 7(a)(2) in the past, courts defer to the current interpretation where it reflects the agency's considered judgment. *Brand X*, 545 U.S. at 980-82.

The Ninth Circuit erred in finding that *TVA v. Hill* allows only one construction of the ESA. Thus, a conclusion that "the Secretary's interpretation is reasonable suffice[s] to decide this case." *Sweet Home*, 515 U.S. at 703.[23]

(continued) . . .
F.3d at 964 (Fed. App. 33a). But the emphasis was on "whatever the cost" to rebut "TVA's claim that the Act was not intended to stop" a project that "was near completion" (437 U.S. at 184) and to rebut TVA's view that courts should have equitable discretion to decline an injunction where the federal agency's own future action would cause the extinction of a listed species (*id.* at 171-74, 193-95).

Further, the court below also relied on the "primary purpose" and "first priority" legislative history cited in *TVA v. Hill*. *Defenders*, 420 F.3d at 964-65 (Fed. App. 34a). That is distinguished at pages 14-15, above. And again, this Court did not address any argument that TVA lacked discretion to not close the dam gates. *Dicta* in *TVA v. Hill* on distinguishable issues should not be controlling on the scope of ESA § 7(a)(2) presented and briefed in the current appeals.

[23] *Sweet Home* sustained FWS's regulatory view of "harm," even though it seemed to be inconsistent with the ESA views of "[b]oth the Senate and House floor managers of the bill." 515 U.S. at 727-28 (Scalia, J., dissenting).

6. The agencies' construction of ESA § 7(a)(2) as not overriding limits on an agency's legal authority accords with many lower court decisions. As the D.C. Circuit stated, the ESA "does not *expand* the powers conferred on an agency by its enabling act." *Platte River*, 962 F.2d at 33-34.[24]

The decision below directly conflicts with *Am. Forest & Paper Ass'n v. U.S. Envtl. Prot. Agency*, 137 F.3d 291 (5th Cir. 1998). There, the Fifth Circuit concluded that EPA could not attach endangered species conditions to a CWA § 402(b) transfer to Louisiana as EPA "'shall approve' proposed state permitting programs that meet nine specified requirements." 137 F.3d at 297. "[N]othing in the ESA grants the agency the authority" to add to or countermand the direction in CWA § 402(b), as "Section 7 of the ESA . . . confers no substantive powers." 137 F.3d at 298. Section 7 is not a "font of new authority" but directs "agencies to channel their *existing* authority in a particular direction." 137 F.3d at 299.

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[24] The ESA "does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the Clean Water Act." *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985). This 1985 decision may be one reason why the 1986-adopted 50 C.F.R. 402.03 and 402.16 state that ESA § 7 is limited to "discretionary" federal actions within an agency's "authority." *See* James Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 529 (1991). The concept that ESA § 7 does not apply where the federal agency had no discretion to consider wildlife impacts also underlies *Strahan v. Linnon*, 967 F. Supp. 581, 607-08 (D. Mass. 1997), *aff'd*, 1998 WL 1085817 at *3 (1st Cir. 1998) ("pursuant to 50 C.F.R. § 402.03, the requirements of § 7 do not apply to the Coast Guard's documentation and inspection duties" because "the Coast Guard is required to issue Certificates of Documentation and Inspection if certain statutory criteria are met, none of which reference environmental concerns").

The Ninth Circuit as well had read § 7(a)(2) not to be an overriding constraint on every federal agency action in many decisions prior to *Defenders*.[25] *Defenders* cannot be fully reconciled with earlier Ninth Circuit precedents. *Accord* Judge Thompson's dissent at 420 F.3d 979-81 (Fed. App. 64a-66a); Judge Kozinski's dissent at 450 F.3d 398 (Fed. App. 75a); Bosse, 35 ENVTL. L. at 1042-47.

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[25] *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), for example, involved a pre-ESA agreement to provide for future construction of reciprocal rights-of-way across intermingled federal and private lands. Under that contract, the federal agency's review of the proposed road was "limited to three factors unrelated to the conservation of the threatened spotted owl." 65 F.3d at 1508. "In light of the statute's plain language," the panel's view that the "regulations supply the answer" by referring to "discretionary" federal control, and "deferring" to the agency's interpretation, the panel concluded that ESA § 7(a)(2) does not apply "where, as here, the federal agency lacks the [wildlife-related] discretion to influence the private action." 65 F.3d at 1509.

Limited discretion in a post-ESA contract defeated claims of broad ESA § 7(a)(2) duties in *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001). The panel held:

> Because the FWS has not retained discretionary control over Simpson's incidental take permit [regarding spotted owls] that would inure to the benefit of the marbled murrelet or the coho salmon [two subsequently listed species], the FWS is not required to reinitiate consultation to consider the permit's effects on those species.

255 F.3d at 1083. To the same effect are *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006), and *Ground Zero for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (ESA § 7 did not apply "because the Navy lacks the discretion to cease Trident II operations . . . for the protection of threatened species"). Thus, *Defenders* is contrary to considerable Ninth Circuit precedent that ESA § 7(a)(2) and 50 C.F.R. 402.03 and 402.16 do not create overriding constraints applicable to even non-discretionary agency action.

Moreover, the panel's attempt to reconcile its opinion with these precedents is unpersuasive. Under the Ninth Circuit decisions discussed in note 25, a federal agency and private party have the statutory authority to essentially contract away the application of ESA § 7(a)(2) to future federal agency actions. Congress should have at least an equal ability to prevent the application of § 7(a)(2) to particular actions by enacting laws that, like the contracts in those cases, preclude consideration of wildlife factors.

7. A particularly pernicious effect of transforming ESA § 7 into a super-statute is that it thwarts the will of Congress as expressed in other statutes. In many statutes, Congress has directed a federal agency to do X (*e.g.*, issue a permit, provide insurance or a grant) if particular conditions are satisfied. Thus, interpreting ESA § 7(a)(2) to create an overriding duty and authority *despite* such directives would seriously impair the ability of federal agencies to issue (let alone issue promptly) any number of permits, loans, insurance, or other government services under the standards specified in their organic laws. The panel's view that ESA § 7(a)(2) adds a procedural consultation prerequisite, and even may prohibit otherwise mandatory federal action, frustrates the legislative objectives of the other statutes.

Yet, a "cardinal principle of statutory construction is that repeals by implication are not favored" and that "wherever possible, statutes should be read consistently." *Kremer v. Chem. Constr. Co.*, 456 U.S. 461, 468 (1982). The "utilize their authorities" language in ESA §§ 2(c) and 7 and the supporting legislative history show there was no "clear and manifest" (*Watt v. Alaska*, 451 U.S. 259, 267 (1981)) intent to repeal the directives of other statutes. *See* pages 13-17 above.

Instead, the ESA and CWA should be read consistently, as they are under Federal Petitioner's view. That is, § 7(a)(2) does not apply when another statute – here, CWA § 402(b) – directs agency action without consideration of wildlife impacts. But ESA § 7(a)(2) applies, and ordinarily is controlling, where the agency is taking action on which its organic laws or contractual commitments leave room for consideration of the particular wildlife issue. Thus, Federal Petitioner's position avoids repeals by implication. In contrast, under the view in the opinion below, ESA § 7(a)(2) repeals by implication the directives in many statutes.

Kremer found that Title VII of the 1964 Civil Rights Act, and subsequent amendments, were not sufficiently clear to repeal 28 U.S.C. 1738's respect for State judgments. 456 U.S. at 468-76. This case presents similar factors. A significant statute and its amendments (here, the ESA and the 1978 and 1979 amendments) should not be read to negate the CWA's express language and important legislative policies on cooperative federalism.

8. The CWA has a federalism objective that States take the lead in regulating the water quality impacts of private land uses.[26] The ESA, as well, has strong provisions on cooperative federalism and respect for State prerogatives.[27] The strong pro-State policies in both the

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[26] 33 U.S.C. 1251(b); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166, 172-74 (2001).

[27] *See* 16 U.S.C. 1531(a)(5) ("encouraging the States . . . through Federal financial assistance and other incentives, to develop and maintain conservation programs"); 1531(c)(2) ("policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species"); 1533(d) and 1535(g)(2) (State law on "take" can sometimes be controlling), 1535(a)-(c) (federal funding of State

(continued....)

CWA and ESA are best served if ESA § 7(a)(2) does not require EPA to condition or possibly prohibit altogether the State assumption of NPDES permitting authority anticipated by CWA § 402(b).

9. The accomplishment of ESA objectives does not require that § 7(a)(2) be transformed into a vehicle to regulate private activities (such as future State-permitted NPDES discharges) that are not directly "authorized, funded, or carried out" by a federal agency.

ESA § 9(a) generally makes it unlawful for "any person" to "take" even a single member of an "endangered" wildlife species. 16 U.S.C. 1538(a)(1)(B). Rules and other ESA provisions extend the same "take" prohibition to most "threatened" wildlife.[28] The "take" of wildlife refers to the "actual death or injury of a protected animal," including wildlife deaths that indirectly result from private activities

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ESA programs in voluntary cooperative agreements). Indeed, "debates over the ESA centered on issues of federalism. Congress was concerned about how not to infringe on state and local authority." Petersen, 19 STAN. ENVTL. L. J. at 441-43.

[28] *See* 50 C.F.R. 17.31(a) (exercising the authority in 16 U.S.C. 1533(d) to make the "take" of most "threatened" wildlife unlawful); *Sweet Home*, 515 U.S. at 690-93 & n.5.

The 1982 Congress softened the absolute prohibition against "take" to allow some productive land uses to proceed despite the possibility of "incidental take." *See* 16 U.S.C. 1536(b)(4), 1539(a)(2); *Sweet Home*, 515 U.S. at 700-01, 707-08. Permitting incidental take "addresses the concerns of private landowners who are faced with having otherwise lawful actions . . . prevented by section 9." H.R. Conf. Rep. No. 97-835 at 29, 1982 U.S.C.C.A.N. 2860, 2870; *see* H.R. Rep. No. 97-567 at 15, 1982 U.S.C.C.A.N. 2807, 2815 (provisions adopted "in response to legitimate problems brought before Congress" by "private landowners").

that adversely modify habitat of listed wildlife. *Sweet Home*, 515 U.S. at 691 n.2; *see id.* at 696-03.

Sufficient protection for listed wildlife is provided by: (1) the ESA § 9 take-avoidance duty on all persons; (2) the ability to enjoin "take" through ESA § 11(g) citizen suits and federal enforcement (16 U.S.C. 1540(e)(6) and (g)); (3) the encouragement of voluntary habitat conservation plans in ESA § 10(a)(2) to resolve incidental take issues; and (4) compensatory acquisition of habitat interests under ESA § 5, 16 U.S.C. 1534. ESA § 7 should not be read broadly to inject federal agencies like EPA into what should be the ESA § 9 take-avoidance obligations of private actors who require no EPA "authorization" for their activities. *See EPIC v. Simpson*, 255 F.3d at 1082-83.

10. As has been illustrated above, the ESA often reflects a balance between competing legislative objectives. This includes balancing the objective to protect listed species against objectives to allow productive land uses, to reduce costs, and to be respectful of State autonomy. *See, e.g.*, 16 U.S.C. 1531(a)(5) and (c); 1533(b)(2), (d), and (f); 1535; 1536(a), (b)(4), and (e)-(p); 1539(a)(2) and (d). Statements to the effect that the "plain intent of Congress . . . was to halt . . . species extinction, whatever the cost" (*TVA v. Hill*, 437 U.S. at 184) do not capture the nuances of the 1973 ESA. In any case, however, such statements do not accurately reflect the compromises in the current ESA. As this Court later observed, the ESA includes "another objective" – "to avoid needless economic dislocation produced by agencies zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

TVA v. Hill is often invoked by lower courts to require whichever interpretation most favors listed species. So it was in the decision below. These appeals present an

opportunity for the Court to set the record straight. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Nos. 06-340, 06-549

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN FISHERIES SOCIETY, ASSOCIATION OF NORTHWEST STEELHEADERS, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, CALIFORNIA TROUT, FEDERATION OF FLY FISHERS, INSTITUTE FOR FISHERIES RESOURCES, MIAMI BEACH ROD & REEL CLUB, NATIVE FISH SOCIETY, NORTHWEST SPORTFISHING INDUSTRY ALLIANCE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, TROUT UNLIMITED, AND WASHINGTON FLY FISHING CLUB IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

Amici, American Fisheries Society, Association of Northwest Steelheaders, California Sportfishing Protection Alliance, California Trout, Federation of Fly Fishers, Institute for Fisheries Resources, Miami Beach Rod & Reel Club, Native Fish Society, Northwest Sportfishing Industry Alliance, Pacific Coast Federation of Fishermen's Associations, Trout Unlimited, and Washington Fly Fishing Club file this brief in support of respondents, Defenders of Wildlife *et al.* *Amici* are a diverse coalition of scientific, commercial, recreational, and conservation advocacy organizations dedicated to protecting and restoring the nation's fisheries and the aquatic habitats and water quality upon which they depend. At stake in this case is the continued effective functioning of two statutes designed to protect these resources – the Endangered Species Act and the Clean Water Act. *Amici* and their members depend on these laws for their livelihoods and recreational opportunities and for the conservation of a natural legacy for their children and grandchildren.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the Environmental Protection Agency ("EPA") violated the Endangered Species Act ("ESA") by transferring federal water pollution permitting authority to Arizona without first

[1] Pursuant to S.Ct.R. 37.3(a) and 37.6, the undersigned represent that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

ensuring that the transfer will not threaten the existence of ESA-listed species. EPA argues that it had no ESA duty to ensure that its transfer decision would protect imperiled species because the ESA inherently conflicts with its Clean Water Act ("CWA") § 402(b) duties. In this brief, *amici* American Fisheries Society *et al.* demonstrate that there is no conflict between the two statutes, and that EPA's conclusion to the contrary was reached through improper procedures and incoherent reasoning.

This brief describes the analytical steps that must be followed in applying the ESA to a CWA § 402(b) transfer decision, highlighting the discretion EPA exercises in making transfer decisions. First, as an action "authorized" and "carried out" by EPA, a transfer of permitting authority is an agency action subject to ESA § 7. *See infra* § I. EPA appropriately recognized this fact early in its consideration of Arizona's transfer request. As EPA recognizes even now, it must exercise judgment when determining whether a state meets the CWA criteria for transferring permitting authority. Moreover, EPA has ample discretion to limit the scope of the transfer and to impose conditions on the state as part of the transfer to ensure that it can effectively oversee state compliance. Thus, ESA § 7 consultation on the effects of this action informs two key decisions by EPA: how it will achieve ESA compliance in applying the CWA transfer factors, and how it will achieve ESA compliance in setting the terms of and carrying out its oversight role. Contrary to EPA's brief, this is not a case where there is *no* discretionary action that can be informed or shaped by an ESA § 7 consultation.

Second, the ESA sets forth detailed procedures for EPA to ascertain whether compliance with ESA's prohibitions against jeopardy and adverse modification of critical

habitat will collide with the agency's other statutory mandates. *See infra* § II. The statute also provides mechanisms for resolving such conflicts in the highly unusual situations when they arise. EPA and the U.S. Fish & Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, the "Services") first identify the effects of the action on listed species in the context of existing environmental conditions and other human activities.[2] The Services render their expert opinion on whether the action is likely to jeopardize the existence of listed species or adversely modify critical habitat. If so, the Services must propose an alternative *within the agency's authority* that would not cause jeopardy or adverse modification. Few consultations result in jeopardy or adverse modification findings, and in fewer still are the Services unable to articulate an alternative that can avoid jeopardy or adverse modification within the agency's existing authorities and goals. It is only after one of the Services makes a jeopardy or adverse modification finding and concludes that there are no alternatives to avoid it that a conflict arises. And even then, the ESA prescribes a process, involving cabinet-level Executive Branch officials, to resolve such conflicts and determine how and whether the action may proceed.

Here, EPA postulates an irresolvable conflict between the mandates of the ESA and CWA before it even starts the steps described above for identifying impacts to listed species and resolving potential conflicts with EPA's underlying statutory obligations. Citing this alleged statutory

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[2] Under the ESA, NMFS has jurisdiction over marine and anadromous species. FWS has jurisdiction over all other species. 51 Fed. Reg. 19,926 (June 3, 1986).

conflict, EPA asks this Court to excuse it from all ESA responsibilities in connection with its transfer decisions. However, under well-established precedent, courts should refrain from deciding whether one statute impliedly repeals another unless there is an irreconcilable conflict between the two statutes. *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citations omitted) (court "must read [two] statutes to give effect to each if we can do so while preserving their sense and purpose"). That admonition is particularly apt here, where Congress has created a process for agencies to identify and resolve conflicts between statutes.

Finally, EPA's *post hoc* rationalization for ESA non-compliance in this case contradicts both its policy guidance on decisions to transfer CWA permitting authority to states – adopted pursuant to notice and comment procedures – as well as its consistent past practice. *See infra* § III.

Because EPA never utilized the ESA's procedures for identifying and resolving conflicts, it would be premature for this Court to reach the court of appeals' alternative holding that the ESA gives EPA "additional" authority to take conservation measures in a hypothetical situation involving a conflict between the ESA and CWA. Instead, this Court should remand the transfer decision for EPA to follow the statutorily prescribed process for assessing the transfer decision's effects on threatened and endangered species. This analysis of effects should be used to achieve compliance with the ESA's jeopardy and adverse

modification prohibitions, to inform EPA's application of the nine CWA § 402(b) transfer criteria and the terms of its oversight, and to resolve any statutory conflicts in the unlikely event that they arise.

I. EPA'S TRANSFER OF CLEAN WATER ACT NPDES AUTHORITY IS AN AGENCY "ACTION" SUBJECT TO ESA § 7.

A. EPA's Transfer of Clean Water Act Authority to States.

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and *biological* integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). Critical to achieving this goal is the National Pollutant Discharge Elimination System ("NPDES"), which mandates technology- and water quality-based permits for the discharge of pollutants. *Id.* §§ 1312, 1311(b)(1)(C). The NPDES program regulates both industrial sources of pollution as well as upland construction and development activities that impact water quality. *See* 33 U.S.C. § 1342(p) (regulating industrial and municipal stormwater runoff).

The CWA allows states to apply to EPA to operate their own NPDES permit programs. To obtain permitting authority, a state must demonstrate, using the nine criteria in CWA § 402(b), that it will operate the program in a manner consistent with the CWA and that it has the resources and legal authority to do so. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.25. Among other things, the state must show that it has the authority to issue permits that will contribute to the maintenance and attainment of water quality standards. *See* 33 U.S.C. § 1342(b)(1)(A). These

water quality standards, developed by states with federal guidance and approval, lie at the heart of the CWA. *Id.* § 1313.[3] Water quality standards consist of designated uses of waterways (*e.g.*, protection of fish and wildlife, drinking water, or recreation), specific criteria that will ensure protection of designated uses, and measures designed to prevent degradation of high quality waters. *See* 40 C.F.R. §§ 131.10-.12.

States protect ESA-listed species in a variety of ways through water quality standards. For example, some states include ESA-listed species among their designated uses. *See, e.g.*, WASH. ADMIN. CODE § 173-201A-200 (2007) (designated uses include "salmonid spawning, rearing, and migration"); IDAHO ADMIN. CODE 58.01.02.100 (2006) (designated uses include salmonid spawning). Other states design state water quality criteria to meet the needs of ESA-listed species. *See, e.g.*, OR. ADMIN. R. 340-041-0028 (2007) ("The purpose of the temperature criteria . . . is to protect designated temperature-sensitive, beneficial uses, including specific salmonid life cycle stages in waters of the State"); MASS. REGS. CODE tit. 314, §§ 4.02, 4.05 (2007) (standards designed to protect aquatic life, which is defined to include "endangered species"); N.C. ADMIN. CODE tit. 15A, r. 2B.0110 (Jan., 2006) (requiring special water quality plans for waters that listed species inhabit). Others protect fish and wildlife generally among their designated beneficial uses. *See, e.g.*, 30 TEX. ADMIN. CODE

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[3] States are required to review their water quality standards every three years and submit any revised or new standard to EPA. 33 U.S.C. § 1313(c). EPA may disapprove these standards if they fail to meet CWA requirements and, if the state fails to correct the problems, EPA may promulgate its own standards. *Id.* § 1313(c)(3).

§ 307.7(b) (2007); FLA. ADMIN. CODE r. 62 302.400 (2007); MD. REGS. CODE tit. 26, § 08.02.01 (2005) (designated uses include "propagation of fish, other aquatic life, and wildlife"); OR. ADMIN. R. 340-041-0004 (2007) (anti-degradation policy specifically incorporates endangered species); *see also* 40 C.F.R. § 131.12(a) (antidegradation standards require protection of "existing uses," which can include habitat for endangered species); 40 C.F.R. pt. 132, App. F, Procedure 2.A.2 (prohibiting variances from water quality criteria that would harm listed species). In Arizona, fish and wildlife are among the designated uses protected by the state's water quality criteria, ARIZ. ADMIN. CODE R18-11-104(B), and the standards include special provisions for designating additional water quality standard limits to protect threatened or endangered species. *Id.* at R18-11-112(D)(4)(b); *see also id.* at R18-11-108 (narrative water quality criteria require water quality that protects aquatic life and is non-toxic to "humans, animals, plants, or other organisms").

By reviewing whether a state's proposed NPDES permitting program will contribute to the maintenance and attainment of water quality standards (through protection of designated uses and meeting criteria and anti-degradation requirements), EPA helps ensure that the program will protect ESA-listed fish and other water quality-dependent species. EPA may not transfer the NPDES permitting program to a state that lacks authority to ensure protection of these water quality standards. 33 U.S.C. § 1342(b). EPA also may approve partial transfers, keeping for itself the authority to issue NPDES permits

for the portion of discharges not transferred. 33 U.S.C. § 1342(n).[4]

Once EPA transfers NPDES authority to a state, whether full or partial, it retains an important role overseeing the state's program. 40 C.F.R. § 123.41-.46; *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) ("Congress preserved for the Administrator *broad authority* to oversee state permit programs") (emphasis added). As part of the transfer, EPA and the state execute a memorandum of agreement ("state MOA") setting forth oversight duties. 40 C.F.R. § 123.24. In a state where authority has been transferred, the CWA requires that EPA review permit applications and draft NPDES permits. 33 U.S.C. § 1342(d), (e). If a state draft permit is outside CWA "guidelines and requirements," EPA has the authority to object to the permit and stop its issuance. 33 U.S.C. § 1342(d)(2); 66 Fed. Reg. 11,202, 11,206 (Feb. 22, 2001). Contrary to the Ninth Circuit's erroneous declaration that neither the Services nor EPA have the authority to "mandate that the state revise any problematic permits," *Defenders of Wildlife v. EPA*, 420 F.3d 946, 973-74 (9th Cir. 2005), EPA may object to an individual permit that fails to ensure compliance with water quality standards, which, as described above, often protect ESA-listed species dependent on water quality. 40 C.F.R. § 123.44(c)(8). If EPA objects to a state draft permit and EPA's concerns are not addressed by the state, authority to issue the permit passes to EPA. 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(h).

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[4] Indeed, only a handful of states have been delegated full authority over all components of the NPDES program. *See* <http://cfpub1.epa.gov/npdes/statestats.cfm> (visited March 21, 2007).

EPA can withdraw or revise its approval for a state to operate a NPDES program if it finds that the state is not administering the program in accordance with the CWA. 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.62-.64. Possible grounds for revoking a transfer include failure to exercise control over regulated activities and repeated issuance of permits that do not protect water quality standards. EPA may also revise a state program if there is a change in state or federal law. 40 C.F.R. § 123.62. Because the EPA negotiates the state MOA at the time of transfer, the transfer decision provides a key opportunity for EPA to facilitate these oversight measures and to tailor its oversight role to the particular needs of each state.

B. EPA's Transfer Decision Involves Discretion.

As even EPA concedes, EPA's decision to transfer NPDES permitting authority to a state is not a rote or ministerial task, but rather involves the "exercise of judgment" to ensure that the state proposal meets CWA standards. EPA Br. at 17. Thus, while a NPDES transfer decision is not *completely* discretionary in the sense that EPA cannot freely refuse to transfer permitting authority to a state that otherwise complies with the nine criteria, EPA exercises significant discretion in assessing whether state-issued NPDES permits will meet water quality standards and other CWA requirements. EPA's role in a transfer decision is not to "rubber stamp" the state's paperwork, but rather to apply complex statutory standards to the unique facts of each state's program and water quality conditions. This analysis focuses in significant measure on whether the state program will adequately protect the habitats of water quality-dependent species in the state.

EPA also has substantial discretion over the content of the state MOA that accompanies the transfer and sets forth the parameters and procedures for EPA's oversight. *See, e.g.*, NPDES MOA Between the State of Maine and the U.S. EPA, Region 1 (Apr. 25, 2000) (hereinafter "Maine MOA") (proposed for lodging); MOA Between the Texas Natural Resource Conservation Commission and the U.S. EPA, Region 6 Concerning the NPDES (May 5, 1998) (hereinafter "Texas MOA") (proposed for lodging). For example, the state MOA dictates the number and kind of permit applications and draft permits that EPA will review. 40 C.F.R. § 123.24(b)(2). It specifies the frequency and content of reports which the state must provide to EPA. *Id.* § 124.24(b)(3). It identifies the kinds of permits EPA will review and the kinds for which review will be waived. 33 U.S.C. § 1342(d)(3); 40 C.F.R. § 123.24(d), (e). EPA may include any provisions in the state MOA that are consistent with its CWA authorities relative to the administration and enforcement of the state program. *Id.* § 123.24(a); *see also id.* (state MOA cannot restrict EPA's statutory oversight responsibility). Thus, for example, EPA could require the state to provide copies of draft permits for discharges in particularly sensitive habitats such as those of ESA-listed species or for discharges that contain a pollutant that threatens ESA-listed wildlife.

C. EPA's Transfer Decision Is a Federal Agency "Action" Within the Meaning of ESA § 7.

ESA § 7 directs all federal agencies, in consultation with the Services, to "insure that *any* action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered

species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species." 16 U.S.C. § 1536(a)(2) (emphasis added).[5] ESA regulations broadly define agency actions as including "all activities or programs of any kind authorized, funded, or carried out, in whole or in part" by the agency, including the "granting of licenses, contracts . . . [and] permits," and "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

Under the ESA's plain language, the decision to transfer NPDES permitting authority to Arizona, which includes both application of CWA § 402(b) transfer criteria and execution of the state MOA setting forth the terms of oversight, is an "action" within the meaning of ESA § 7. EPA has long recognized that transfer decisions are subject to the ESA's mandatory proscriptions, and has consulted with the Services to ensure that state programs do not jeopardize listed species. *See, e.g.*, 63 Fed. Reg. 51,164, 51,198 (Sept. 24, 1998) (approving Texas to administer NPDES permits and rejecting industry comment that ESA § 7 does not apply to transfer); 61 Fed. Reg. 65,047, 65,052 (Dec. 10, 1996) (approving Oklahoma to administer NPDES permits and noting that "EPA's approval of the State permitting program under Section 402 of the Clean Water Act is a federal undertaking subject to [the consultation] requirement"). Throughout the administrative proceedings in this case, EPA recognized that the transfer

[5] ESA § 7's prohibitions on jeopardy to listed species and adverse modification of their critical habitat are distinct legal duties. *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 n.46 (5th Cir. 2001) (citations omitted). For the sake of brevity, this brief uses the term jeopardy to encompass both.

of NPDES authority to Arizona was an agency action under ESA § 7.[6]

Upon requesting *certiorari*, however, EPA shifted its position, arguing that transfer is not subject to ESA § 7 at all. According to EPA, the transfer of CWA permitting authority is not an "action" within the meaning of ESA § 7(a)(2) because EPA has "no control whatever" over the transfer "but instead is directed by Congress" to perform it. EPA Br. at 25 n.7. However, EPA has extensive discretion in deciding whether and how to transfer NPDES permitting authority. Like virtually every federal agency action, there are boundaries on the exercise of that discretion, but EPA nonetheless has extensive control, both in applying the CWA § 402(b) transfer criteria and in setting the terms of oversight through the state MOA.[7]

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[6] Prior to the Supreme Court phase of this case, EPA consistently recognized that a NPDES transfer decision is an agency action under ESA § 7. *See infra* § III.

[7] EPA acknowledges that other actions it performs under the CWA are subject to ESA § 7. For example, under § 303(c) of the CWA, EPA has a duty to review and – if certain criteria are met – approve state water quality standards. *See* 33 U.S.C. § 1313(c). EPA's review of water quality standards and its review of state NPDES programs thus both require EPA to exercise its discretion within the boundaries imposed by statute. EPA does not explain why it believes that its approval of state water quality standards is an agency action subject to ESA § 7, while its approval of a state's NPDES transfer application is not.

II. EPA INCORRECTLY CONCLUDED THAT THERE IS AN IRRESOLVABLE CONFLICT BETWEEN STATUTORY MANDATES WITHOUT FOLLOWING THE ESA'S STEPS FOR IDENTIFYING AND RESOLVING SUCH CONFLICTS.

Petitioners EPA and National Association of Home Builders ("NAHB") argue that the ESA and CWA § 402(b) are in conflict as a matter of law and that EPA's transfer decision is therefore exempt from the ESA. However, EPA never attempted to determine whether it could satisfy the ESA while complying with CWA § 402(b). Instead, it prematurely concluded that there is an irreconcilable conflict between the mandates of the ESA and CWA, sidestepping the very procedures designed to identify and resolve such conflicts.

The ESA establishes an interagency consultation process to identify the effects of proposed actions on listed species and to determine whether and how those effects should be addressed consistent with the agencies' other statutory duties. Until EPA follows the prescribed procedures for evaluating the effects of transferring NPDES authority to Arizona on listed species that depend on adequate water quality, it cannot make a reasoned determination on whether compliance with the ESA's jeopardy prohibition would necessitate violating the CWA. Rather than working through the statutory process for harmonizing CWA and ESA obligations, EPA seeks to write the ESA out of the equation. This Court should reject EPA's invitation to speculate about an irresolvable conflict between the ESA and CWA when EPA has failed to follow the required procedures for identifying and resolving any such conflicts.

A. The ESA § 7 Process for Identifying and Evaluating an Action's Effects on Listed Species.

The first step in the ESA § 7 consultation process is to identify species that may be impacted by the agency action. Regulations implementing the ESA require a federal agency to review its actions "at the earliest possible time to determine whether any action may affect listed species. . . ." 50 C.F.R. § 402.14(a). An agency typically asks the FWS whether any listed species or species proposed to be listed may be present in the area of the proposed action. 16 U.S.C. § 1536(c). The agencies then determine the extent to which the proposed action will affect listed species. The agency proposing the action ("the action agency") begins this process by conducting a biological evaluation of the action's effects on listed species or their critical habitat. If the proposed action "may affect" listed species or critical habitat, the agency must formally consult with FWS. The action agency typically asks FWS to initiate formal consultation and transmits its biological review and effects findings to begin that process. Formal consultation culminates with FWS's issuance of a biological opinion. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(a).

In formulating a biological opinion, FWS is required to determine whether the effects of the proposed action, added together with cumulative effects and the environmental baseline, is likely to result in jeopardy. 50 C.F.R. §§ 402.02, 402.14(g)(4).[8] FWS must provide a "detailed"

[8] "Cumulative effects are those effects of the future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." "The environmental baseline includes the past and present

(Continued on following page)

discussion of the effects of the action on listed species and their habitat. *Id.* § 402.14(h)(2). The effects of the action include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action." *Id.* § 402.02. FWS also determines whether the action will incidentally "take" members of listed species. If so, FWS may authorize such take, subject to mandatory conditions to minimize the harm, as long as the take will not lead to jeopardy. 16 U.S.C. § 1536(b)(4).

B. EPA Overlooked Virtually All Potential Water Quality Effects to Species Which Must Be Analyzed Under ESA § 7.

Although EPA and FWS went through the motions of consulting on the NPDES transfer, they skipped most of the crucial analytical steps. In this case, FWS identified 60 listed species in Arizona that live in, adjacent to or otherwise depend on that state's surface water quality and thus may be impacted by NPDES permitting. Biological Opinion ("BO"), App. 1, 06-340 Pet. App. 122-24. EPA then conducted a biological evaluation and found that the proposed transfer "may affect" these listed species and their critical habitat, triggering a requirement to engage in formal consultation. Biological Evaluation ("BE"), 06-340 Pet. App. 587-88.

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impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." 50 C.F.R. § 402.02 (defining "cumulative effects" and "effects of the action").

What is unique about this consultation, compared to others, is the way the agencies then defined the "effects of the action." Prior biological opinions issued by FWS and NMFS confirm that the effects of the action, *i.e.*, the transfer, are the impacts to listed species of state-issued water pollution permits. *See, e.g.*, Biological Opinion on NPDES transfer to Maine, from Michael J. Bartlett (FWS) and Patricia A. Kurkul (NOAA) to Stephen Silva (EPA) (Jan. 12, 2001) at 18 (discussing effects of the action of transfer of NPDES authority to Maine) (proposed for lodging); Biological Opinion on NPDES transfer to Texas, from David Frederick (FWS) to Gregg Cooke (EPA) (Sept. 14, 1998) at 30 ("the area affected by the action includes all aquatic, riparian and terrestrial habitat that are or may be affected by issuance of TPDES [Texas Pollution Discharge Elimination System] permits") (proposed for lodging). In contrast, EPA's biological evaluation of the Arizona transfer fails to analyze or even discuss the harmful effects of CWA-permitted discharges on any of the 60 Arizona ESA-listed species, many of which (such as the Gila trout and the desert pupfish) depend entirely on the health of Arizona's rivers and streams for their survival. Instead, EPA summarily concludes that any harmful effects of such discharges would be "insignificant and/or discountable" because CWA protections under Arizona's administration of the program would be identical to those under federal administration. BE, 06-340 Pet. App. 616.

FWS's biological opinion, like EPA's biological evaluation, ignores most of the effects of the CWA-permitted discharges on the listed species and critical habitat of Arizona. It lacks virtually all of the critical elements required by the ESA and its regulations. Regarding the environmental baseline, nowhere does the biological

opinion assess current extinction threats facing any of the 60 listed species in Arizona. Instead, the baseline analysis briefly discusses just two listed species, the pygmy owl and Pima pineapple cactus. BO, 06-340 Pet. App. 108-11. Similarly, the cumulative effects analysis briefly mentions that such effects could lead to jeopardy to listed species, but then fails to elaborate. *Id.* at 115-16.

Regarding direct and indirect effects of the action, the biological opinion lacks any analysis of the biological effects of state NPDES permits on listed species. It never discusses what types of pollution will be discharged into rivers and streams occupied by listed species. Nor does it assess the measures that Arizona will employ to ensure that listed fish species will not be exposed to contaminated water. FWS admits that "there will likely be indirect effects stemming from water quality issues," without describing these water quality issues and indirect effects. *Id.* at 113. Instead of analyzing the *biological* effects of the transfer, FWS offers a *legal* conclusion that the loss of ESA consultations resulting from the transfer is not an effect covered by the ESA and its regulations. *Id.* at 114-15.

In failing to analyze the biological effects of the action on ESA-listed species in the context of existing conditions and other activities affecting water quality, FWS not only violated its own regulations, *see* 50 C.F.R. § 402.14, it left itself and EPA incapable of evaluating whether these species would be jeopardized by the proposed transfer. Without such an evaluation, EPA could not legitimately conclude that complying with its ESA duty to avoid jeopardy required violating the CWA.

If FWS and EPA had properly analyzed the biological effects of transfer, EPA would have had a basis for deciding whether Arizona's program was adequate to protect the water quality upon which listed species rely. If the program was deemed inadequate, EPA potentially could have denied the transfer, in whole or in part, consistent with its CWA duty to ensure that state proposals meet the CWA's minimum criteria. Even if EPA were required by the CWA to transfer authority to Arizona, it could have ensured against jeopardy to ESA-listed species using its CWA oversight authority by recommending changes to draft permits and if necessary, vetoing them and issuing its own. By the same token, EPA could have ensured against jeopardy by using its discretionary authority to revoke a state transfer where the state repeatedly issues permits that are not sufficiently protective of water quality-dependent species. 33 U.S.C. § 1342(c).

Finally, EPA broadly asserts that ESA § 7 does not require action agencies to protect listed species from harms caused by other actors. EPA Br. at 22. However, the ESA requires agencies to ensure that "any" action that they "authorize" or "fund" is not likely to jeopardize listed species. 16 U.S.C. § 1536(a)(2). Agency permits, which authorize activities by others, are among the agency actions that must comply with ESA § 7. 50 C.F.R. § 402.02 ("action" defined as including "granting of . . . permits"). Thus, the federal permitting agency must ensure that activities authorized by the permit, even if carried out by private parties, will not cause jeopardy. *See, e.g.*, *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170 (D.D.C. 2004) (biological opinion analyzed impacts of activities by mining permittee, not just permitting agency). The ESA has never

been read to limit § 7(a)(2) to those instances where the federal agency is the entity discharging the pollutant.

C. EPA Failed to Utilize the ESA's Procedures for Resolving Potential Statutory Conflicts.

As noted above, the ESA prescribes a process for ascertaining whether there is a conflict between an agency action and the ESA, and if so, for resolving any such conflict. Had EPA and FWS followed this process, any effects of transferring NPDES authority to Arizona that cause jeopardy would likely have been identified and mitigated pursuant to EPA's CWA authority as part of the application of the CWA § 402(b) transfer criteria and the development of the accompanying state MOA.

The first step in the conflict resolution process is for FWS and EPA to perform a meaningful effects analysis and determine whether the proposed action would lead to jeopardy. If no jeopardy is found, then EPA's § 7(a)(2) obligations with respect to the proposed action are complete. Having ensured that jeopardy will not occur, EPA can proceed with the transfer and there is no potential for conflict with its CWA § 402(b) obligations. The picture changes if consultation results in a determination that the transfer of NPDES authority to Arizona would jeopardize the existence of any listed species. In a jeopardy situation, the ESA requires FWS to propose a "reasonable and prudent alternative" ("RPA") that would enable EPA to avoid violating ESA § 7(a)(2) but that also is within the scope of EPA's CWA authority. 16 U.S.C. § 1536(3)(A). RPAs are alternatives to proposed actions that do not cause jeopardy to a species, are consistent with the intended purpose of the action, and "can be implemented

consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. § 402.02. Thus, in situations where specific components of an agency's action are truly nondiscretionary, a valid RPA could allow those components to proceed but require the agency to take other mitigating actions within its authority to remove the jeopardy to listed species.

In this case, because FWS and EPA never performed an adequate analysis of the transfer's effects on ESA-listed species, neither agency assessed whether jeopardy would occur. Even if jeopardy had been found, FWS and EPA would likely have been able to craft an RPA allowing the transfer to proceed but ensuring against jeopardy. For example, an RPA could have been designed to enable EPA to scrutinize, object to, or federalize individual state-issued permits that present significant risks to listed species by undermining water quality. Having never even investigated the possibilities of jeopardy and RPAs, however, EPA could not rationally conclude that the specific conservation measures needed to avoid violating ESA § 7(a)(2) would violate CWA § 402(b).

Finally, in cases where FWS concludes that jeopardy will occur, and the agencies are unable to identify an RPA that would avoid this result while allowing the agency to proceed in a manner consistent with its authorities, the ESA prescribes a process for resolving this statutory conflict. Under ESA § 7(g), a federal agency may apply to a Cabinet-level "Endangered Species Committee" for an exemption from ESA § 7(a)(2), *i.e.*, for permission to proceed with an action that will jeopardize a listed species. 16 U.S.C. § 1536(g). The Committee is authorized to grant an exemption only upon a showing of several substantive criteria. *Id.* § 1536(h)(1)(A). In contrast to an RPA, which

by definition must be consistent with the agency's authorities, in deciding whether to grant an exemption, the Committee may consider alternative courses of action that are "beyond original project objectives and acting agency jurisdiction." 50 C.F.R. §§ 450.01, 453.03(a)(1)(ii).

Had EPA and the Services concluded that NPDES transfer to Arizona would have caused jeopardy to any species, and had they been unable to identify any RPA within EPA's authority to avoid jeopardy, the ESA would have required EPA to seek an exemption from the Committee before proceeding with the transfer. Indeed, Congress established this exemption process to address the very situation EPA claims to find itself in here – an irresolvable conflict between the ESA and a proposed action. Congress's creation of this elaborate conflict resolution mechanism demonstrates that it did not intend to exempt actions that only theoretically pose a statutory conflict from compliance with the ESA.

D. EPA's "Legal Causation" Argument Is Inconsistent with the ESA's Procedures for Resolving Potential Statutory Conflicts.

EPA seeks to circumvent the ESA's process for identifying and resolving statutory conflicts by arguing that Congress, not EPA, is the legal cause of any harmful effect of the proposed transfer. EPA argues that it is not the "legal cause" of any effects to listed species as a consequence of the proposed transfer, and therefore the transfer decision is not subject to ESA § 7. EPA Br. at 23. This approach suffers from several analytical flaws.

As a threshold matter, EPA's "cause" argument is simply a variant of its flawed "lack of discretion" argument. EPA argues that any effects must have been caused by Congress since they flow from a transfer which Congress dictated must occur. The premise underlying this argument is incorrect. As discussed in § I.B. *supra*, EPA has discretion under the CWA to make multiple judgment calls in applying the nine CWA § 402(b) transfer criteria – which specifically incorporate the protection of fish and wildlife – and in setting the conditions of the state MOA.[9]

Moreover, EPA's causation argument confuses two fundamentally separate questions: (1) is a transfer of NPDES authority an "action" that is "authorized, funded, or carried out" by EPA?; and, (2) if so, what effects must be analyzed in a consultation on that action? In its "causation" argument, EPA promotes a theory under which the second question subsumes the first, such that an action that allegedly causes no effects is no longer an "action" subject to the ESA. However, ESA § 7 applies to *any* action authorized, funded or carried out by a federal agency, and the consultation process is the mechanism for evaluating the action's effects. The concept of "legal causation" plays no role in determining whether the transfer or any other agency action constitutes an "action" within the meaning of § 7(a)(2). Rather, since the transfer is plainly an action subject to ESA § 7, EPA and FWS must proceed to analyze its direct and indirect effects in the context of current

[9] EPA argues that it was "undisputed" that the CWA § 402(b) criteria had all been satisfied. EPA Br. at 11. However, respondents never conceded that the CWA criteria had been met. Their case focused solely on EPA's ESA noncompliance.

conditions and other activities in an ESA consultation. *See supra* § II.A. This analysis never took place.

EPA's argument that Congress is the cause of any effects (and that the ESA is therefore inapplicable to this action) relies almost exclusively on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). A comparison of *Department of Transportation* to this case reveals that it lends little support to EPA's sweeping legal causation argument. First, the Department of Transportation ("DOT") acknowledged (and no party or reviewing court disputed) that the issuance of its regulations constituted an "action" subject to the National Environmental Policy Act ("NEPA"), the statute at issue. 541 U.S. at 761. Thus, EPA's proposed interpretation of "action" under the ESA finds no support in *Department of Transportation*.

Second, NEPA, like the ESA, prescribes a process for an agency to evaluate the effects of its actions. DOT followed this process and assessed the effects of the motor carrier safety regulations along with the impacts of the entry of Mexican trucks entering the United States as a result of the President's lifting of a moratorium. *Id.* at 761, 769-70. The Court in *Department of Transportation* ruled on DOT's discretion and authority only after DOT developed the facts through the NEPA process. It did not invite the courts to make judgments about the discretion and authority of federal agencies where, as here, statutorily-mandated procedures have not yet been followed and the facts therefore have not yet been developed.

Third, NEPA and the ESA differ in that NEPA merely imposes procedural obligations to disclose and analyze an action's environmental impacts, while the ESA contains substantive prohibitions against certain detrimental

impacts on listed species. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) (refusing to extend NEPA precedent to ESA case as two statutes "serve different purposes"). Accordingly, mere disclosure and consideration of the action's effects against the backdrop of current conditions and other activities is the end point under NEPA, but not under the ESA. If the result will jeopardize a listed species, the ESA goes further than NEPA and seeks to eliminate or minimize that impact, and the ESA administrative process has additional steps to achieve that result.

Finally, the statutory mandates of EPA and DOT differ in that DOT has an obligation to register all motor carriers that are willing and able to comply with safety and financial responsibility requirements. The agency has no authority to act on the basis of environmental impacts of the truck traffic. In contrast, before EPA can transfer NPDES permitting authority to a state, it must determine that certain criteria pertaining to water quality are satisfied, and it has the authority to condition the transfer to aid in exercising its oversight to achieve water quality goals. EPA is incorrect in suggesting that its authority to prevent harm to listed species is as constrained as the DOT's authority to act to prevent environmental harm.

In the end, the transfer is an "action," just as the safety regulations were an action in *Department of Transportation*. In each situation, the agencies had a duty to analyze the action's effects in accordance with statutorily mandated processes. While DOT did so, EPA did not and therefore EPA has not worked through the administrative process to identify any legal causation or conflict issues to be resolved by the courts.

III. EPA'S ARGUMENTS ARE IMPROPER *POST HOC* RATIONALIZATIONS AND DIRECTLY CONTRADICT POSITIONS IT ADOPTED THROUGH NOTICE AND COMMENT RULEMAKING.

In its petition for a writ of *certiorari*, EPA argued for the first time in this litigation that ESA § 7 does not apply to CWA § 402(b) transfer decisions. Accompanying the petition was a recent, hasty exchange of letters with the Services, in which the agencies adopt this new legal position in the context of an otherwise dormant Alaska NPDES transfer proposal.[10] Because these rationalizations for ESA noncompliance were articulated outside the scope of the administrative record, fundamental precepts of administrative law require that they be disregarded. *See Sec. and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 92-95 (1943).

In addition, this Court owes little deference to EPA's newly-constructed interpretations of the interplay of the ESA and CWA because they were developed informally, without the benefit of public notice and comment. *See U.S. v. Mead*, 533 U.S. 218, 230-31 (2001). Deference is particularly unwarranted because EPA reversed course and abandoned interpretations that it adopted in 2001 through rulemaking procedures. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446, n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."); *Motor Vehicle*

[10] Because EPA had previously rejected Alaska's transfer proposal as incomplete, there was no apparent reason for the agencies to address EPA's ESA duties as to the Alaska transfer other than to buttress EPA's position in this litigation.

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (courts impose presumption "against changes in current policy that are not justified by the rulemaking record."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[11]

In 2001, the EPA, NOAA Fisheries, and FWS entered into a national agreement regarding enhanced coordination under the CWA and ESA. *See* Memorandum of Agreement Between the EPA, FWS, and NMFS Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202 (Feb. 22, 2001) ("Coordination Agreement"). In this Coordination Agreement, adopted after public notice and comment, EPA reaffirmed its long-held view that the objectives and structure of the CWA are "compatible and complementary" with those of the ESA. *See id.* at 11,208. EPA recognized that water-dependent ESA-listed species are "an important component of the aquatic environment that the CWA is designed to protect," *id.* at 11,206, and that the CWA "is a powerful vehicle for improving the quality of the aquatic environment on which many endangered and threatened species depend." *Id.* at 11,203.

The Coordination Agreement acknowledges that "EPA's current practice is to consult with the Services

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[11] *See also Nat'l Family Planning and Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992) ("When an agency promulgates a legislative regulation by notice and comment directly affecting the conduct of both agency personnel and members of the public, whose meaning the agency announces as clear and definitive to the public and, on challenge, to the Supreme Court, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule.").

where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species." *Id.* at 11,205.[12] The focus of the Coordination Agreement is not on how EPA might deny transfer requests, but rather how EPA will oversee state permits once the state has assumed permitting authority. Although the Coordination Agreement acknowledges that EPA can object only to those permits that are outside the "guidelines and requirements of the CWA," it affirms that the CWA's "authorities are sufficiently broad . . . to address the broad range of situations that arise in the NPDES program." *Id.* at 11,206.

> EPA has authority and responsibility for overseeing the operation of State/Tribal NPDES programs through, among other means, review of State/Tribal NPDES permits where appropriate. EPA's oversight includes consideration of the impact of permitted discharges on waters *and species that depend on those waters.* EPA does this by among other things, determining whether State and Tribal permits indeed attain water quality standards. . . . Where EPA determines that the exercise of its objection authority is appropriate to protect endangered and threatened

[12] NAHB argues that EPA did not consult on the majority of its transfer decisions made before 1993. NAHB Br. at 11. However, this was not based on any argument that ESA § 7 is inapplicable to transfer decisions. Many state transfer decisions occurred early in the implementation of the ESA, prior to most ESA listings, 39 Fed. Reg. 26,061 (July 16, 1974) (approval of transfer requests from 15 states). No consultation is required where state-issued permits will not affect a listed species. *See* 50 C.F.R. § 402.14(a). Neither NAHB nor EPA cite to any occasion prior to the Supreme Court phase of this case where EPA has asserted that ESA § 7 does not apply to CWA § 402(b) transfer decisions.

> species, the Agency will act pursuant to its existing authorities under the CWA, (i.e., where the proposed permit would be "outside the guidelines and requirements" of the CWA).

Id. 11,215 (emphasis added). Where a state permit is likely to result in jeopardy to a listed species, EPA will "use the full extent of its CWA authority to object" to the permit. *Id.*

The Coordination Agreement also confirms that, under existing regulations, states with transferred NPDES programs are required to provide draft permits to the federal fish and wildlife agencies, and respond to any concerns that they raise. *See id.* at 11,206 (citing 40 C.F.R. § 124.10(c)(iv),(e); § 124.11, § 124.17, § 124.59(b),(c)). While the Coordination Agreement does not purport to alter any agency's existing authorities, it seeks to "ensure[] that EPA has the full benefit of the Service's views on potential impacts to Federally listed species and designated critical habitats in determining whether CWA requirements are met." *Id.* Of course, if EPA federalizes a permit because of unresolved objections and issues a permit on its own, EPA must consult pursuant to ESA § 7 on that action to ensure compliance with the ESA's no-jeopardy mandate. *Id.* at 11,215.

The Coordination Agreement's approach is embodied in various state MOAs that EPA has executed at the time of transferring CWA § 402(b) authority. In the Maine MOA, for example, EPA and the state agree that state permits would protect ESA-listed species by ensuring compliance with state water quality standards, and that EPA would object to any permit that risks harm to a listed species by threatening water quality. Maine MOA at 4; *see also* Texas MOA at 32-33 (describing mechanism for ensuring that Texas permits do not harm listed species – if

concern is raised and state does not resolve, EPA "shall" assume jurisdiction and issue the permit). *See also* § I.C. *supra* (describing other transfer decisions where EPA successfully integrated the ESA and CWA).

In summary, in 2001 EPA decided, after a full notice and comment procedure and careful deliberation, that the ESA and CWA are easily harmonized and that compliance with CWA § 402(b) does not preclude compliance with ESA § 7. Its consistent practice across the states has been to harmonize the two statutes and acknowledge its ESA § 7 duties. This Court should reject EPA's improper attempt to put forth a contradictory position in the late stages of this litigation and instead should require that EPA undergo ESA consultation on its proposed Arizona transfer decision and set forth its conclusions and rationale in the administrative record.

CONCLUSION

For the reasons stated above, this case should be remanded to EPA to consult with FWS on the biological effects of its proposed transfer decision consistent with the CWA and ESA.

Respectfully submitted,

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Nos. 06-340 and 06-549

IN THE

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NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

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DEFENDERS OF WILDLIFE, ET AL.,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ARIZONA POWER AUTHORITY, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, AND UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* ARIZONA POWER AUTHORITY, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, AND UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE* [1]

Whether Section 7(a)(2) of the Endangered Species Act ("ESA" or "the Act") overrides statutory mandates or constraints placed on an agency's discretion by other Acts of

[1] The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *Amici* state that their counsel authored this brief and *Amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *Amici* made a monetary contribution to its preparation.

Congress is of exceptional national importance and critical to States, to nationally significant agricultural and business interests, and to entities, such as *Amici*, who are responsible for delivering power and water to tens of millions of people. All parties have consented to the filing of this Brief.

Amici Arizona Power Authority, Central Arizona Water Conservation District, and Utility Water Act Group's members provide water or power, either directly or indirectly, to States, tribes, municipalities, public agencies, irrigation and power districts, homes, businesses, and other customers. *Amici* operate and own permitted facilities in States that hold delegated Clean Water Act ("CWA") permitting authority and are therefore concerned about the interplay between the CWA and the ESA. Reading ESA Section 7(a)(2) to apply to the Environmental Protection Agency's ("EPA") nondiscretionary delegation of CWA permitting authority to the States and, by extension, to arguably trump the long-standing federal allocations of water and power that *Amici* and their customers depend upon to meet their needs, would have devastating implications for *Amici's* future water and power operations.

The decision creates uncertainty about an agency's obligations under ESA Section 7(a)(2) despite the limitations of the agency's own organic authority. The decision, therefore, threatens federal water and power projects throughout the west, including those that depend upon the water and power facilities of the Colorado River. The decision also threatens the Utility Water Act Group's members who operate in, and hold National Pollutant Discharge Elimination System ("NPDES") permits issued by, Arizona and other delegated States. Those members face uncertainty, disruption and delay as States grapple with the potential ramifications of this decision.

Amici's concern is not only with the impact of the panel's decision on the NPDES permit program, but also the impact

the decision may have on *Amici's* future water and power operations and rights to water and power under contracts they have entered into with federal entities. Whether ESA Section 7(a)(2) overrides statutory mandates or other binding legal obligations of federal agencies is critical to the security of *Amici's* rights and to the well-being of the communities and customers that they serve.

Arizona Power Authority

The Arizona Power Authority ("APA") is a corporate and political body of the State of Arizona established by the legislature in 1944. ARIZ. REV. STAT. §§ 30-101, *et seq.*, §§ 45-1701, *et seq.* The APA is responsible for acquiring and marketing the State of Arizona's 377-megawatt share of power from Hoover Dam and then transmitting this power over the Parker-Davis and Pacific Intertie transmissions systems.

The APA serves 32 wholesale customers, including towns, irrigation, water and electrical districts throughout Arizona, with power—electrical energy generated from the flow of the Colorado River—from the Hoover Dam. Any interruption or diminution of the delivery of power from Hoover Dam would significantly impact the APA's delivery of power to its customers.

Central Arizona Water Conservation District

The Central Arizona Water Conservation District ("CAWCD") is a political subdivision of the State of Arizona that was formed for the purpose of contracting with the United States for the delivery of the water supply and for the repayment of the State's share of the costs of constructing the Central Arizona Project ("CAP"). This Court's decree in *Arizona v. California* confirmed Arizona's right to consump-

tively use 2.8 million acre-feet ("maf")[2] of Colorado River water annually. *Arizona v. California*, 373 U.S. 546, 577 (1963) (opinion) and 126 S. Ct. 1543 (2006) (amended decree) (hereinafter "Decree"). Despite the Decree, however, Arizona could not fully use its Colorado River water because it lacked a water delivery system capable of transporting Colorado River water to the heavily populated regions of central and southern Arizona. Accordingly, in 1968, Congress enacted the Colorado River Basin Project Act, which authorized the Secretary of the Interior ("Secretary") to construct the water delivery system known as the CAP. 43 U.S.C. §§ 1501, *et seq.* ("Basin Project Act").

In order to provide for CAP operation and repayment, the Basin Project Act also gave the Secretary the authority to enter into a master contract with an Arizona organization having the power to levy assessments against all taxable real property within its boundaries. 43 U.S.C. § 1524(b)(1). In response, the CAWCD was formed in 1971 as a municipal corporation of the State of Arizona. ARIZ. REV. STAT. §§ 48-3701, *et seq.* CAWCD comprises Maricopa, Pinal and Pima counties and encompasses roughly 80 percent of Arizona's water users and taxpayers. In 1972, CAWCD entered into a master contract with the Secretary, providing for the repayment of reimbursable CAP construction costs and the delivery of the CAP water supply. CAWCD is also responsible for operating and maintaining the CAP aqueduct system.

Pursuant to the Basin Project Act, its own Arizona enabling legislation, and the master contract, CAWCD has entered into numerous subcontracts for delivery of CAP water supplies to agricultural irrigation districts and municipal and industrial entities in central and southern Arizona. CAWCD's

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[2] An acre-foot equals 325,851 gallons—the amount of water needed to cover one acre of land with water one foot deep. One acre-foot of water can supply the household needs of a four-person family for one year.

subcontractors include the cities of Phoenix, Tucson, Scottsdale, Mesa, Peoria, Glendale, Tempe and Chandler, all of which depend upon the delivery of Colorado River water by means of the CAP. In 2006, CAWCD delivered over 1.5 maf of Colorado River water to agricultural, municipal, and tribal entities served by the CAP. Overall, Colorado River water delivered by the CAP makes up about one-third of Arizona's annual renewable water supplies.

Utility Water Act Group

The Utility Water Act Group ("UWAG") is an ad hoc group of 211 individual energy companies and three national trade associations of energy companies, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers nationwide. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of nonprofit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly owned (municipal and State) energy utilities in 49 States representing 16 percent of the market.

UWAG's purpose is to participate on behalf of its members in agency rulemakings under the CWA and in litigation arising from those rulemakings. On occasion, these activities have involved both of the agencies and statutes at issue here. For example, UWAG has filed comments on the Memorandum of Agreement between the EPA and the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") regarding implementation of the ESA in

CWA-related matters. *See* Draft Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and the Endangered Species Act, 64 Fed. Reg. 2742 (proposed Jan. 15, 1999). UWAG members are directly affected by NPDES permit decisions made by EPA and delegated States under the CWA. UWAG, in turn, is interested in consistent, timely, and objective permit decisions for its members, as well as a clear delineation of authority between EPA and FWS on implementation of their respective statutory obligations. In addition, UWAG members are subject to many other environmental statutes, most of which also impose non-discretionary standards on the federal agencies charged with their administration. The potential application of the Ninth Circuit decision to those statutes is of concern to UWAG members.

Amici jointly have broad and united interests in urging this Court to reverse the Ninth Circuit's erroneous decision. ESA Section 7(a)(2) does not override a federal agency's organic law or its contracts with non-federal parties. A proper resolution of this issue is essential.

SUMMARY OF ARGUMENT

Amici file this brief on writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005) in support of Petitioners, the EPA and the National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association.

The Ninth Circuit's decision invalidated EPA's transfer of the NPDES permit program to Arizona. Under the CWA, the NPDES permit program is administered by EPA unless the program is transferred to a State. If the State meets nine exclusive criteria laid out in CWA Section 402(b), the CWA provides that EPA "shall approve each such submitted program unless [it] determines that adequate authority does not exist" to ensure that the nine specified criteria are satisfied. 33 U.S.C. § 1342(b). The criteria set by Congress do not permit EPA to impose additional conditions.

Section 7(a)(2) of the ESA requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat. ESA Section 7(a)(2) consultation is required for actions "in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added); *see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996). Thus, Section 7(a)(2)'s consultation requirement is properly construed to apply only to the exercise of EPA's existing discretionary authority—it does not override the Congressional mandates explicitly set out in CWA Section 402(b). Because EPA lacked the discretion to deny transfer of the NPDES permit program to Arizona if Arizona met the nine enumerated conditions of CWA Section 402(b), EPA's decision was not "agency action" within the meaning of ESA Section 7.

If the Ninth Circuit decision stands, the ESA would become a federal "super law," modifying not only EPA's obligation under the CWA, but arguably overriding every statutory mandate applicable to federal agencies. The decision is contrary to agency regulations, settled law of other circuits, and prior decisions of the Ninth Circuit and sets an important precedent on the relative powers and constraints of the ESA and the CWA (and, by extension, other federal laws). This Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING APPLYING ESA SECTION 7(A)(2) TO CWA SECTION 402(B) CONTRADICTS CONGRESS'S CLEAR INTENT IN THE CWA.

Section 402(b) of the CWA provides that the EPA "shall approve" the permitting program submitted by a State unless EPA "determines that adequate authority does not exist" to enable the State to administer the program in accordance with nine specific criteria. Accordingly, a State seeking to administer its own NPDES permit program must submit (1) "a full and complete description of the program it proposes to establish under and administer under State law" and (2) "a statement from the attorney general" that the laws of the State "provide adequate authority to carry out the described program." 33 U.S.C. § 1342(b).

CWA Section 402(b) thus prescribes "a system for the mandatory approval of a conforming State program." *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). If a State's program satisfies the enumerated criteria, EPA must approve the State's application. EPA found that Arizona had met all the requirements of CWA Section 402(b) and approved the State of Arizona's application to administer the NPDES permit program. Yet the Ninth Circuit invalidated the transfer because, according to the Ninth Circuit, EPA should have considered a tenth criterion—the effect of the transfer on threatened and endangered species.

The Ninth Circuit held that EPA violated ESA Section 7(a)(2) because EPA did not analyze the effects of the loss of Section 7 consultation when EPA transferred the permit program to Arizona. The court of appeals invalidated EPA's approval of the transfer on the grounds that ESA Section

7(a)(2) overrides the requirements of CWA Section 402(b).[3] The court of appeals concluded that EPA's approval of Arizona's Section 402(b) program was the legally relevant cause of impacts to endangered species that would result from the State's issuance of NPDES permits for State-permitted land use activities.

The criteria established by Congress in CWA Section 402(b) for delegation of permitting authority to States do not include impacts to listed species or to habitat designated as critical in accordance with ESA Section 4(a)(3). Congress mandated that EPA transfer permitting authority to the States once the nine criteria are met. After NPDES permitting authority is transferred to the State, EPA may only object to a State-issued permit if the permit is "outside the guidelines and requirements" of the CWA.[4] 33 U.S.C. § 1342(d)(2).

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[3] This Court directed the parties to address the additional question of whether the court of appeals correctly held that EPA's decision to transfer permitting authority to Arizona was arbitrary and capricious and, if so, whether the court of appeals should have remanded to EPA without ruling on the interpretation of ESA Section 7(a)(2). The Court need not remand because an agency has broad discretion to change its position so long as it articulates a rational basis for its view. The relevant federal agencies have concluded that, because CWA Section 402(b) requires that the State's application be granted if the nine criteria are satisfied, the decision whether to approve the transfer is not subject to the ESA Section 7(a)(2) consultation requirements. *See* Petition for a Writ of Certiorari of United States Environmental Protection Agency App. at 93a-102a, *U.S. EPA v. Defenders of Wildlife*, (U.S. Oct. 23, 2006) (No. 06-549) (hereinafter "App."). FWS and NMFS have further confirmed that agency conduct mandated by another Act of Congress, here, the CWA, is not subject to "discretionary Federal involvement or control" within the meaning of 50 C.F.R. § 402.03. *See* App. 103a-116a. Because the agencies have articulated "'a satisfactory explanation for [their] action[s]' including a 'rational connection between the facts found and the choice made,'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted), a remand is not appropriate.

[4] The court of appeals' decision creates procedural and substantive uncertainty for permittees holding State-issued permits. Permittees must

This reflects Congress's careful consideration of the issue and its final decision to grant States the right to administer NPDES permit programs under State law so long as the program meets the requirements of CWA Section 402(b).[5] The court of appeals' decision, however, overrides the CWA's directive that EPA "shall approve" a State transfer application that satisfies the nine criteria and effectively imposes a tenth criterion. The Ninth Circuit's holding is erroneous and should be overturned by this Court.

A. The Clean Water Act Splits Federal and State Authority to Promote Water Quality Objectives.

The Federal Water Pollution Control Act Amendments of 1972, known as the CWA, 33 U.S.C. §§ 1251-1387, are predicated on "a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). After emphasizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pol-

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comply with State-specific procedural rules governing permit applications and drafting, public notice requirements, issuance and appeals. Permittees must also comply with technology-based and water quality-based limits and conditions of State-issued permits, and meet applicable State resource agencies' statutory and regulatory requirements. The State delegation program under CWA Section 402(b) not only implements the cooperative federalism of the CWA—it also relieves EPA from a substantial administrative burden.

[5] "After the Administrator [of EPA] has promulgated the guidelines and requirements for a State permit program, the Governors of the individual States desiring to administer their own permit program may submit to the Administrator a full and complete description of the planned integrated State permit program. If the Administrator determines that a State has the authority to issue permits consistent with the act, he shall approve the submitted program. In that event, the States, under State law, could issue State discharge permits." HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMM. (Oct. 4, 1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 261-62 (1973) (Statement of Rep. Wright).

lution [and] to plan the development and use . . . of land and water resources . . .," the Act specifies that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources."[6] 33 U.S.C. § 1251(b), (g). Congress balanced many concerns in the CWA to achieve "cooperative federalism," by conveying some authority to EPA, delegating some to the States, and creating mechanisms to shift authority between the two.

For example, States are primarily responsible for adopting and periodically revising water quality standards. 33 U.S.C. § 1313(a), (c)(2)(A). Those standards must "be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and . . . also taking into consideration their use and value for navigation." *Id.* States must then submit their standards to EPA for approval. If EPA determines that a State's standards are not consistent with the CWA, the Agency must so inform the State within 90 days following the State's submission. If the State does not adopt changes necessary to meet the applicable statutory requirements within 90 days following EPA's notice, then EPA has a mandatory duty to establish replacement federal standards. 33 U.S.C. § 1313(c)(3), (4).

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[6] "[I]t is [the legislators'] intent that the act be administered in such a manner that the abilities of the States to control their own permit programs will be developed and strengthened. They look for and expect State and local interest, initiative, and personnel to provide a much more effective program than that which would result from control in the regional offices of the [EPA]." HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMM. (Oct. 4, 1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 262 (1973) (Statement of Rep. Wright).

States bear primary responsibility for assessing the quality of their waters and developing water quality standards (from which water-quality based permit limits are derived). States also develop total maximum daily loads ("TMDLs") for any waters identified as not meeting applicable water quality standards and then implement TMDLs through NPDES permits. 33 U.S.C. § 1313(d)(1)(A)-(D). As with the underlying water quality standards, EPA is responsible for reviewing and approving State water quality assessments and TMDLs. 33 U.S.C. § 1313(d)(2).

Congress devised the NPDES permitting program as a mechanism for implementing the water quality-based tools that are adopted by States, as well as other technology-based tools adopted by EPA. Recognizing that the content of these permits is dictated, in large part, by State-specific needs and requirements (*e.g.*, water quality standards, assessments, and TMDLs), Congress prescribed, in the CWA, the procedure for EPA to transfer its administration of the NPDES permit program to a qualifying State that meets the nine statutory criteria. The transfer of the program by EPA to a qualifying State is mandatory.

Since 1972, EPA has delegated NPDES permitting authority to 45 States. These States serve a vital role in administering the NPDES permit program and furthering our Nation's water quality objectives. Further, there is no basis to assume that NPDES permits issued in by delegated States, including Arizona, will cause harm to listed species. The ESA prohibits the "take" of endangered and threatened species and that "take" prohibition applies to both federal and non-federal acts. *See* 16 U.S.C. § 1538. Activities that require NPDES permits may also involve some form of federal action that will trigger consultation, for example, if the activities occur on federal land or require a CWA Section 404 permit issued by the U.S. Army Corps of Engineers. Therefore, it is wrong to assume that the absence of federal administration of the

NPDES program will lead to harm for listed species. Endangered or threatened species or their designated critical habitat may still be subject to the consultation requirements of ESA Section 7(a)(2) due to other federal statutory or permitting requirements.

The Ninth Circuit reads ESA Section 7(a)(2) to superimpose consultation requirements that may otherwise prohibit mandatory federal action under the CWA. Applying the ESA consultation process to EPA's delegation of NPDES programs to the States will "sabotage the delicate machinery that Congress designed" to delegate these programs.[7] *Merrell v. Thomas*, 807 F.2d 776, 779 (9th Cir. 1986). This frustrates Congress's legislative intent. Congress could have included a consultation requirement among the statutory criteria for NPDES program delegation; it did not.[8] If the Ninth Circuit decision stands, it will carry with it uncertainty, disruption,

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[7] In *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986), the Ninth Circuit upheld a grant of summary judgment to EPA in a challenge to enjoin EPA from continuing to register certain herbicides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The court found that the differences between FIFRA's registration procedure and the National Environmental Policy Act's (NEPA") requirements indicated that Congress did not intend NEPA to apply. *Id.* at 778-80. The court determined that "[t]o apply NEPA to FIFRA's registration process would sabotage the delicate machinery that Congress designed to register new pesticides," and would increase a regulatory burden that Congress had intentionally lightened. *Id.* at 779.

[8] Several environmental statutes explicitly command the federal agency administering the statute to approve State regulatory programs that satisfy certain statutory requirements, including the Resource Conservation and Recovery Act ("RCRA"); *see* 42 U.S.C. § 6926(b) (allowing for authorization of State hazardous waste program); the Solid Waste Disposal Act ("SWDA"), *see* 42 U.S.C. § 6991c(a) (regulation of underground storage tank release, detection, prevention, and correction programs); and FIFRA, *see* 7 U.S.C. § 136i(a)(2) (regulation of applicators of pesticides).

and delay, impeding the cooperative federalism that is at the core of the CWA.[9]

B. ESA Section 7(a)(2) Applies Only to Discretionary Acts and Therefore Does Not Apply to CWA Section 402(b).

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). A federal agency's duty under ESA Section 7(a)(2) is to ensure that endangered or threatened species are not jeopardized by actions attributable to the agency itself. Regulations jointly promulgated by the Secretaries of Commerce and the Interior interpret ESA Section 7(a)(2) to require consultation on actions "in which there is *discretionary* Federal involvement or control."[10] 50

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[9] Other statutes outside the environmental context contain cooperative federal-state provisions. For example, under the Medicaid statute, in order to receive federal funding, a State must first obtain from the Department of Health and Human Services ("HHS") approval of a State plan to provide healthy services to indigents in that State; to obtain federal approval from HHS, the State plan must satisfy a lengthy list of statutory requirements. *See* 42 U.S.C. § 1396a. The federal welfare laws also provide examples of such cooperative federal-state arrangements, including programs under Temporary Assistance to Needy Families, 42 U.S.C. § 602; Child Welfare Services, 42 U.S.C. § 622; Promoting Safe and Stable Families, 42 U.S.C. § 629(b); Child Support and Establishment of Paternity, 42 U.S.C. § 654; and Foster Care and Adoption, 42 U.S.C. § 671. Each of these state-run programs, like Medicaid, must be approved by HHS before a State can receive federal funding. Arguably, if the Ninth Circuit's decision stands, those programs could be deemed subject to the ESA.

[10] The construction of Section 7(a)(2) of the ESA reflected in 50 C.F.R. §§ 402.02 and 402.03 is reasonable and entitled to deference. *See, e.g.*,

C.F.R. § 402.03 (emphasis added); *see Marbled Murrelet*, 83 F.3d at 1073. ESA Section 7(a)(2) does not confer independent authority on federal agencies to act for the benefit of listed species; rather, it directs the agencies to consult on actions where the agencies have discretionary authority.

The court of appeals wrongly held that ESA Section 7(a)(2) applies even if the law governing the conduct of the agency gives the agency no discretion to modify its action. Where the agency has no discretion to act because the conduct is mandated by an Act of Congress, the act itself cannot constitute "agency action" within the meaning of Section 7 of the ESA. The Service's regulation, 50 C.F.R. § 402.03, effectuates this Congressional intent. The court of appeals' decision thwarts that intent and nullifies the regulation.

II. THE NINTH CIRCUIT'S OPINION IS AN ANOMALY THAT MUST BE REVERSED.

Only the Ninth Circuit has held that the ESA overrides statutory limitations on an agency's authority. The decision conflicts with the decisions of virtually every other court that has considered the issue, including decisions within the Ninth Circuit.

A. The Court of Appeals Misapplied the Causation Analysis of *Public Citizen*.

Under the regulations, an agency is required to take into account only those effects that are "caused" by its actions, including indirect effects. *See* 50 C.F.R. § 402.02 (defining "indirect effects" as "those that are caused by the proposed action and are later in time, but still are reasonably certain to

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Auer v. Robbins, 519 U.S. 452, 461-62 (1997) (agency interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'"); *United States v. Mead*, 533 U.S. 218 (2001).

occur"). Where, as here, the effects flow from a statutory mandate, those effects are caused by Congress, not by the agency's action. The court of appeals, however, found EPA's transfer of CWA permitting authority to be the "cause" of all effects that may flow from land uses that require State-issued NPDES permits. That holding is erroneous; EPA's act of transferring the NPDES permit program to the State does not proximately cause impacts to listed species.

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Court considered whether, under NEPA and the Clean Air Act ("CAA"), the Federal Motor Carrier Safety Administration ("FMCSA") is required to evaluate the effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA's promulgation of certain regulations would allow such cross-border operations to occur. *Id.* at 756. *Public Citizen* is relevant here because of the Court's analysis of causation: "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. The *Public Citizen* standard, therefore, should be applied to determine whether EPA's action is the "legally relevant 'cause' of," *id.*, effects on listed species and any designated critical habitat.

The Ninth Circuit cited *Public Citizen* but misunderstood its import. The court of appeals erroneously held that all impacts resulting from private development under NPDES permits Arizona might issue would be caused by EPA's transfer decision. They are not. CWA Section 402(b) mandates that EPA "shall approve each such submitted program" unless EPA "determines that adequate authority does not exist" to administer the program in accordance with the nine criteria. Thus, EPA is not the cause of any harm that may result from activities that are authorized by NPDES permits issued legally by Arizona after the transfer of the NPDES

permitting program occurs. Rather, as FWS concluded in the Biological Opinion, the cause of any potential impacts is Congress's decision, in the CWA, to limit EPA's discretion by requiring transfer of the program where the criteria in CWA Section 402(b) are met.[11] This conclusion is consistent with the meaning of *Public Citizen*.

B. Other Circuits Have Properly Construed ESA Section 7(a)(2) to Apply Only to Discretionary Actions.

The court of appeals' decision directly conflicts with the Fifth Circuit's decision in *American Forest and Paper Ass'n v. U.S. EPA*, 137 F.3d 291 (5th Cir. 1998) ("*AFPA*") and the D.C. Circuit's decision in *Platte River Whooping Crane Critical Habitat Maint. Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992) ("*Platte River*"). Both courts properly construed ESA Section 7(a)(2) and held that the ESA does not supersede constraints or override statutory mandates applicable to federal agencies.[12]

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[11] The Fish and Wildlife Service correctly concluded that the act of transferring the program to the State could not be a "cause" of any impacts to species:

> [The] loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal [Clean Water Act] permits reflects Congress's decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Defenders of Wildlife, 420 F.3d at 953 (quoting the Biological Opinion).

[12] The Ninth Circuit decision also conflicts with a decision from the Eighth Circuit where the court observed that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority." *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005).

AFPA involved EPA's approval of Louisiana's NPDES permitting program under CWA Section 402(b), the precise agency action at issue in the case at bar. As part of its approval of the Louisiana program, EPA added a condition that Louisiana consult with FWS and NMFS before issuing permits. After reviewing Section 402(b), the Fifth Circuit held that the CWA prescribed the factors to be considered by EPA, and the ESA, therefore, could not trump the mandatory character of the CWA transfer provision or supplant the criteria considered for approving transfers under the CWA. "The language of [CWA Section] 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements." *Id.* at 297. The court thus concluded that "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction." *Id.* at 299.

The D.C. Circuit has similarly reasoned that ESA Section 7 consultation is effectively limited by an agency's statutory authority. In *Platte River*, environmental groups brought a challenge to annual licenses issued to two hydroelectric projects on the Platte River by the Federal Energy Regulatory Commission ("FERC"). Under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, FERC was precluded from amending the annual licenses given to a hydroelectric plant. For that reason, FERC could not insert conditions to protect wildlife into the licenses when they were renewed. *Platte River*, 962 F.2d at 32.

The groups argued that, notwithstanding the statutory limits of the Federal Power Act, FERC had an affirmative obligation to impose conditions to protect listed species under ESA Section 7(a)(2). *Id.* at 33. The D.C. Circuit rejected that argument: "[T]he statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not

expand the powers conferred on an agency by its enabling act." *Id.* at 34 (emphasis in original).[13]

The panel below acknowledged that there was "an existing intercircuit conflict on the question before us," comparing *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989) and *Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir. 1979) with *AFPA* and *Platte River*. The court of appeals did not find the D.C. Circuit and Fifth Circuit decisions persuasive, but instead said it was relying on decisions from the First and

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[13] The Ninth Circuit's decision is also counter to several prior Ninth Circuit decisions holding that non-discretionary actions do not trigger Section 7 consultation obligations. *See, e.g., Western Watersheds Project v. Matejko*, 456 F.3d 922 (9th Cir. 2006) (duty to consult is only triggered where there is discretionary action; BLM's decision not to exercise discretionary authority and regulate private diversions of water is not an "action" within the meaning of ESA Section 7(a)(2), and BLM did not retain discretion to regulate diversions for benefit of listed species); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (Navy need not consult on the operation of a new missile program where there is no agency discretion to act because consultation "would be an exercise in futility"); *Environmental Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir. 2001) (FWS was not required to reinitiate consultation under ESA Section 7(a)(2) because it had not retained discretionary control over an earlier-issued incidental take permit sufficient to require the recipient of that permit to take steps that would inure to the benefit of the listed species); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("Where there is no agency discretion to act, the ESA does not apply."); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (FWS advisory letter did not constitute a "federal action" triggering a duty to consult under ESA Section 7 because "there was no discretionary federal involvement or control over the Lumber Companies' proposed salvage operations"); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (Bureau of Land Management approval of road construction was not a "discretionary" action triggering consultation responsibilities where the federal agency lacks "the ability to implement measures that inure to the benefit of the protected species").

Eighth Circuits. *Defenders of Wildlife*, 420 F.3d at 970. As Judge Kozinski explained in his dissent from the court of appeals' denial of en banc review, those cases are inapposite:

> The First and Eighth Circuit cases, however, do not support the majority's position. Both cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does.

Defenders of Wildlife v. U.S. EPA, 450 F.3d 394, 401 n.5 (9th Cir. 2006) (emphasis in original).

Conservation Law Foundation involved the sale of offshore leases for oil and gas exploration under the Outer Continental Shelf Lands Act ("OCSLA"). 623 F.2d at 714. Conservation organizations argued that, once the leases were sold, the Secretary would lose the ability to protect natural resources under the strict standards of the ESA because the Secretary would be forced to comply with the less stringent standards of the OCSLA. *Id.* at 715. The Secretary countered that the ESA and the OCSLA are complementary, and that the ESA would continue to apply "of its own force" because the Secretary would have discretionary authority over the leases. *Id.* The First Circuit agreed. *Id.* Similarly, in *Defenders of Wildlife v. Administrator, EPA*, the Eighth Circuit held that EPA was not exempt from compliance with the ESA under FIFRA, 7 U.S.C. §§ 136-136y. 882 F.2d at 1294. Neither decision addressed whether ESA Section 7(a)(2) overrides statutory constraints placed on an agency by another Act of Congress because in both cases the ESA was complementary to the statute authorizing the agency action. Therefore, the court of appeals' reliance on *Conservation Law Foundation* and *Defenders of Wildlife v. Administrator, EPA* is misplaced.

The Ninth Circuit goes even further and reads the ESA to create an independent, affirmative obligation in contra-

vention of the requirements of the CWA. "The EPA may have complied with its obligations under the Clean Water Act, but compliance with a 'complementary' statute cannot relieve the EPA of its *independent obligations* under section 7(a)(2)." *Defenders of Wildlife*, 420 F.3d at 971 (emphasis added). If the decision is not reversed, an agency may be obliged to act even though its organic statute says it may not. This cannot be the law.

C. The Decision Creates Uncertainty About the Application of ESA Section 7(a)(2) to Federal Agencies' Non-Discretionary Acts.

The court of appeals' decision may have far-reaching implications for many agency actions. Litigation has been brought over the scope of the Bureau of Reclamation's discretion to act under its water contracts and its responsibilities under ESA Section 7(a)(2). In each of these cases, the courts have found that, where Reclamation has no discretion to alter water deliveries because of applicable law or contract, it is not subject to ESA Section 7(a)(2). By finding that "the ESA applies to anything 'authorized, funded, or carried out, by a federal agency, . . . whether discretionary or not," 450 F.3d at 398 (Kozinski, J.), the court of appeals' holding calls into question existing contracts that *Amici* hold with Reclamation and other federal agencies, creating uncertainty about the relationship of ESA Section 7(a)(2) to these long-standing arrangements.

This issue was considered in *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003),[14] where the plaintiffs challenged Reclamation's management of the lower Colorado River, arguing that Reclamation should send more

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[14] *Amici* APA and CAWCD filed an amicus-brief in *Defenders of Wildlife v. Norton* on the proper scope of Reclamation's discretion and how it should be viewed in light of the ESA.

water to Mexico for the benefit of listed species found there. Reclamation initiated informal consultation under ESA Section 7(a)(2), but concluded that no formal consultation was required because it lacked discretion over water deliveries to or within Mexico under applicable treaties and this Court's decision in *Arizona v. California*, 376 U.S. 340 (1964). 257 F. Supp. 2d at 66. The district court agreed, finding that Reclamation had no authority to deliver water for the benefit of species in Mexico:

> The record contains no suggestion of a way, with or without consultation [under Section 7(a)(2) of the ESA], for Reclamation to ensure that more water reaches the listed species in [Mexico]. The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation's authority.

Id. at 67-68 (citing *Arizona v. California*, 376 U.S. 340 (1964)). Thus, due to the limited scope of Reclamation's discretion under the Law of the River,[15] the court held that consultation under ESA Section 7(a)(2) was not required because no delivery of water to benefit species in Mexico was allowed:

> [I]t seems unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water.

Id. at 69.

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[15] The Law of the River collectively refers to the treaties, compacts, laws, court decrees and contracts that govern the allocation and use of Colorado River water.

The Rio Grande River has also been the subject of litigation considering the application of the ESA to Reclamation contracts. In *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, Case No. 05-2399 (and consolidated cases) (10th Cir. filed Dec. 29, 2005) ("*Silvery Minnow*"), the U.S. Court of Appeals for the Tenth Circuit is faced with a similar issue arising from a district court decision misconstruing the ESA to override Reclamation's obligations under existing contracts on the Rio Grande.[16] In *Silvery Minnow*, plaintiffs sought to require Reclamation to release water or to restrict diversions of water, in contravention of its existing contracts, for the benefit of the silvery minnow. Reclamation argued that water on the Rio Grande was fully allocated and it had no discretion under its existing contracts to release water for the silvery minnow.

The district court rejected that argument and ordered Reclamation to make releases or restrict diversions. *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222 (D.N.M. 2002). In doing so, the district court erroneously transmuted the ESA's requirement that Reclamation consult on its discretionary actions into a substantive command that Reclamation unilaterally divert contractually-allocated water away from long-standing Reclamation contractors for the benefit of the silvery minnow.[17] The 10th Circuit must now determine what federal actions are properly subject to ESA Section 7(a)(2) consultation.

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[16] *Amici* APA and CAWCD filed an amicus brief in support of the United States in *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, No. 05-2399 (10th Cir. filed June 26, 2006).

[17] Of course, there is always room for Reclamation or local authorities to take voluntary action to acquire water supplies or resources from willing sellers to benefit protected species.

CONCLUSION

For all of the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

NATIONAL ASSOCIATION
OF HOME BUILDERS, et al.,

Petitioners,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, WESTLANDS WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, SAN DIEGO COUNTY WATER AUTHORITY, NATIONAL WATER RESOURCES ASSOCIATION, AND NORTHERN COLORADO WATER CONSERVANCY DISTRICT IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are water districts and agencies located in the western states that provide, or whose members provide, water supplies for urban, agricultural and industrial uses and power generation. The *amici* serve the water needs of some of the largest metropolitan and farming regions in the western states, such as the Cities of Los Angeles and San Diego and California's Central and Imperial Valleys. The *amici*, or their members, have entered into contracts with the United States, acting through the Secretary of the Interior or the U.S. Bureau of Reclamation ("Bureau"), under which the Bureau has agreed to, and does, deliver water from federal reclamation projects to the *amici* or their members. These federal projects include, among others, the Central Valley Project in California, which is the nation's largest federal reclamation project; various federal projects on the Colorado River, such as Hoover Dam and Glen Canyon Dam; and the Colorado-Big Thompson Project in Colorado. These projects, and others operated by the Bureau that provide water supplies to the *amici*, are a major source of water supplies for domestic, agricultural and industrial uses and power generation in the western states.

The Ninth Circuit held below that the Endangered Species Act (ESA) imposes requirements on federal agencies that override the agencies' obligations under their governing statutes and other authorities. Under the Ninth Circuit decision, the Bureau may be required to reallocate some of the water developed by federal reclamation projects for the purpose of benefiting endangered species, which would impair the contractual rights of the *amici* or their members to receive water supplies from the projects. Thus, the *amici* have an interest in this case.

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[1] The parties have consented to the filing of this *amici curiae* brief (Rule 37.2). This brief was not written in whole or part by the parties' counsel, and no one other than *amici* made a monetary contribution to its preparation (Rule 37.6).

The *amici* are as follows:

The Association of California Water Agencies (ACWA) represents approximately 90% of the public water agencies in California, which provide water supplies for domestic, agricultural and industrial uses in California.

The Metropolitan Water District of Southern California (MWD), the nation's largest urban water district, is a consortium of 26 cities and water districts located in southern California, which provides water supplies to approximately 18 million people residing in southern California.

The Westlands Water District (WWD), located in California's Fresno and King Counties, is one of the nation's largest agricultural water districts, and provides irrigation water and drainage service to the farmers located within its district and municipal and industrial water to local residents and entities.

The Imperial Irrigation District (IID), located in California's Imperial Valley, is one of the nation's largest irrigation districts, and provides water service and power to agricultural users in the Imperial Valley, and also power to customers in the Imperial and Coachella Valleys.

The San Diego County Water Agency (SDCWA) is the wholesale water supplier to its 23 member public agencies in San Diego, County, California, and provides approximately 80-90% of water supplies for such agencies.

The National Water Resources Association (NWRA) is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the western states. Its members include some of the West's largest water districts, such as the Central Arizona Water Conservation District (Arizona), the Colorado River Water Conservation District (Colorado), the Middle Rio Grande Conservancy District (New Mexico), and the Las Vegas Valley Water District (Nevada).

The Northern Colorado Water Conservancy District (NCWCD) operates the Colorado-Big Thompson Project in Colorado, which conveys an average of 213,000 acre-feet of water each year through the Rocky Mountains beneath the Continental Divide to irrigate over 693,000 acres and to supply approximately 750,000 people in 32 cities and towns and 12 water districts.

SUMMARY OF ARGUMENT

This case raises the question whether the Endangered Species Act (ESA) imposes requirements that override the specific requirements of other federal laws directing federal agencies to take actions that may affect endangered species. Under section 7(a)(2) of the ESA, a federal agency must consult with the Secretary of the Interior or the Secretary of Commerce (hereinafter collectively "Secretary") before taking action that may jeopardize endangered species, and the Secretary is then authorized to propose alternative courses of action to avoid jeopardy. The Ninth Circuit below held that section 7(a)(2) creates "additional authority" that "goes beyond" the agencies' existing authority under their governing statutes, and thus requires compliance with ESA requirements even though such compliance may conflict with the agencies' duties under their governing statutes. The court also held that a regulation adopted by the Secretary, which provides that section 7 applies to "discretionary" federal actions, 50 C.F.R. § 402.03, simply establishes "coterminous" requirements with statutory requirements and places a "gloss" on them. In short, the court held that section 7(a)(2) creates "additional authority" that overrides other potentially conflicting agency obligations, and that the Secretary's regulation does not substantially modify or limit the "additional authority" thus created.

The Ninth Circuit analysis is deficient in two major respects. First, section 7(a)(2) imposes requirements

applicable to federal agency "action," but does not indicate whether such "action" includes actions that an agency is specifically mandated to take under other statutory authority that may be inconsistent with ESA requirements. Thus, the provision does not indicate whether its terms apply to *all* agency action – irrespective of whether the agency has discretion under its governing statutes to comply with the terms – or instead applies only to action that the agency has discretion to take under its governing statutes. If the provision applies to both discretionary and nondiscretionary actions, the provision would be in conflict with other statutes that mandate specific agency action and do not allow the agency to exercise discretion in carrying out the mandates. Conversely, if the provision applies only to discretionary actions, the agency would have discretion under its other statutory authority to comply with ESA requirements and no conflict would occur. Under principles of statutory construction, statutes should be construed, if possible, to avoid conflicts. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974). Therefore, section 7(a)(2), properly construed, applies only to action that an agency has discretion to take under its governing statutes. The Ninth Circuit's analysis, by interpreting section 7(a)(2) as applicable to all agency action irrespective of other statutory requirements, creates rather than avoids conflicts between the ESA and other statutes. Contrary to the Ninth Circuit decision, the ESA is not a superlaw that trumps all other laws defining agency missions and responsibilities.

Second, the Secretary has adopted a regulation interpreting section 7(a)(2) as applicable to "discretionary" federal actions – that is, actions that an agency has discretion to take under its governing statutes. Thus, while the ESA itself does not address possible conflicts with other statutes, the Secretary's regulation does address possible conflicts and provides an interpretation that avoids them. This Court has held that reasonable agency

interpretations of ambiguous statutes are entitled to deference, particularly where, as here, the interpretation is imbedded in a regulation adopted through the formal rulemaking process. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001). Since the Secretary's regulation provides a reasonable – and indeed the most logical – interpretation of the statute, the regulation is entitled to deference under *Chevron* and *Mead*. The Ninth Circuit decision, on the other hand, effectively nullifies the Secretary's regulation by interpreting it as imposing "coterminous" requirements with the statutory requirements, and thus as not having any practical meaning or significance in defining agency responsibilities. Rather than deferring to the Secretary's regulation as required by *Chevron* and *Mead*, the Ninth Circuit effectively wrote it out of existence.

Applying these principles here, the Clean Water Act (CWA) requires the Environmental Protection Agency (EPA) to approve Arizona's application to administer its CWA permit program if the program meets the criteria spelled out in the statute, as the Arizona program does. Under section 7(a)(2), as clarified by the Secretary's regulation, the EPA has no discretion under the CWA to disapprove the Arizona program in order to benefit endangered species. Therefore, section 7(a)(2) does not apply to the EPA's approval of the Arizona's program.

If Congress wishes to expand the scope of the ESA to impose agency obligations that override agency obligations under other statutes, Congress has the power to do so. To date, Congress has not done so. The responsibility for changing the relationship between the ESA and other laws – and for elevating ESA requirements above those of other laws, if that is the desired outcome – rests with the legislative rather than the judicial branch.

ARGUMENT

I. SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT DOES NOT IMPOSE REQUIREMENTS THAT CONFLICT WITH AND OVERRIDE A FEDERAL AGENCY'S SPECIFIC OBLIGATIONS UNDER ITS GOVERNING STATUTES.

A. The Ninth Circuit Held That Section 7(a)(2) Imposes Requirements That Override Specific Agency Obligations Under the Agencies' Governing Statutes.

Section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies – in consultation with either the Secretary of the Interior or the Secretary of Commerce (hereinafter collectively "Secretary") – to "insure" that "any action authorized, funded, or carried out" by them is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of" the species' critical habitat. 16 U.S.C. § 1536(a)(2). The agency must consult with the Secretary before taking any prospective action that "will likely affect" such species. *Id.* at § 1536(a)(3). If, as a result of such consultation, the Secretary determines that the proposed agency action will jeopardize the species or impair its critical habitat, the Secretary must issue a "biological opinion" setting forth "reasonable and prudent alternatives" that the Secretary believes "would not violate" section 7(a)(2) and "can be taken" by the agency. *Id.* at § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(8), -(h). Thus, section 7(a)(2) requires federal agencies to consult with the Secretary before taking any action that may affect an endangered or threatened species, and the Secretary, if he determines that the proposed action may jeopardize the species or impair its habitat, must propose "reasonable and prudent alternatives" to avoid these effects. *See Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

The Ninth Circuit held that section 7(a)(2) requires the EPA to consult with the Secretary before approving

Arizona's application to administer its National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act (CWA). *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005); App. 1a-67a. The Ninth Circuit reasoned that the EPA's approval of the Arizona NPDES program will potentially jeopardize threatened or endangered species in Arizona, because – once the federal permit program is transferred to the state – the mitigation measures adopted for the species under the federal program will no longer apply. The court acknowledged that the CWA, according to its express terms, mandates the EPA to approve state applications to administer NPDES permit programs if the programs meet the criteria spelled out in the CWA. Specifically, section 402(b) of the CWA provides that the EPA "shall approve" applications by states to administer their NPDES programs "unless" the EPA determines that the proposed state program fails to meet these statutory criteria. 33 U.S.C. § 1342(b). These statutory criteria are largely nondiscretionary; they require that the state program include, for example, notice requirements, procedures for civil and criminal enforcement, and provisions for monitoring reports. *Id.* As the Ninth Circuit noted, the Arizona program has not been challenged on grounds that it fails to meet these statutory criteria. *Defenders*, 420 F.3d at 963 n. 11; App. 31a.

The Ninth Circuit ruled, nonetheless, that the EPA cannot approve the Arizona program unless and until the agency has consulted with the Secretary pursuant to section 7(a)(2) of the ESA, which triggers the Secretary's authority and responsibility to propose reasonable and prudent alternatives to avoid jeopardy. According to the court, section 7(a)(2) creates authority that "goes beyond that conferred by the agencies' governing statutes," and imposes requirements "in addition to those created by the agencies' own governing statute." *Defenders*, 420 F.3d at 964, 967; App. 34a, 38a. *See also id.* at 969; App. 42a (agency has "continuing decisionmaking authority over the challenged action"), *id.* at 970; App. 44a (section 7(a)(2) is "a modicum of additional authority to agencies, beyond

that conferred by their governing statutes"). Thus, the Ninth Circuit held that the agency must consult and avoid jeopardy under section 7(a)(2) even though these requirements may be inconsistent with the agency's specific responsibilities under its governing statutes – a term that, as used in this brief, refers to the agency's enabling statutes defining its missions and responsibilities, such as the CWA here. Under the Ninth Circuit decision, the consultation and no-jeopardy requirements of section 7(a)(2) override the agency's specific obligations under its governing statutes, where these requirements are in conflict.

B. Under Applicable Principles of Statutory Construction, Section 7(a)(2) Cannot Be Properly Construed as Imposing Requirements That Override Agency Obligations Under the Governing Statutes.

The Ninth Circuit correctly concluded that section 7(a)(2) imposes additional requirements beyond those established in the agency's governing statutes, although, as will be explained, these additional requirements do not apply to the extent they are inconsistent with those established in governing statutes. Section 7(a)(2), which requires federal agencies to consult with the Secretary before taking action that may jeopardize endangered species or impair their critical habitats, 16 U.S.C. § 1536(a)(2), imposes requirements not found in other federal laws defining agency missions and responsibilities. As this Court stated in *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 175 n. 20, some earlier federal statutes, such as the Lacey Act and the Migratory Bird Treaty Act, provided protection of fish and wildlife under specific circumstances, but prior to enactment of the ESA "there were few laws regulating these creatures." Thus, the responsibility of federal agencies to avoid jeopardy to endangered species – *qua* endangered species – arises solely from the ESA, not from other statutes. If an agency has sufficient latitude under its governing statutes to avoid taking actions that may jeopardize an endangered

species, the agency violates the ESA if it nonetheless takes the action.

On the other hand, the ESA contains no language indicating that the consultation and no-jeopardy requirements of section 7(a)(2) apply to the extent they are inconsistent with other specific obligations imposed in the governing statutes. Section 7(a)(2) requires that an agency "insure" that "any action authorized, funded, or carried out" by it does not cause jeopardy. The word "insure" describes what the agency must do regarding actions falling within the scope of the statute; the agency must "insure" – that is, "make certain," MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed.), p. 607 – that the action does not cause jeopardy. The word "insure" does not, however, describe what actions fall within the statutory scope, which is the question raised here. Thus, although the Ninth Circuit regarded the word "insure" as highly probative in defining agency responsibilities under the ESA, *Defenders*, 420 F.3d at 967; App. 38a, the word cannot bear the weight the Ninth Circuit placed on it.

The scope of the statute, as applied to agency action, is instead described in the phrase "any action authorized, funded, or carried out" by the agency. This phrase describes the statutory reach as it applies to agency action. The phrase does not indicate, however, whether it applies to *all* agency action that may affect endangered species – regardless of whether the agency has authority under its governing statutes to comply with ESA requirements – or instead applies only to action affecting endangered species that the agency can permissibly take under its other statutory authority. In other words, the phrase does not indicate whether it applies to both discretionary and nondiscretionary actions – as defined in the agency's governing statutes – or only to discretionary actions. This question is crucial in determining whether the ESA conflicts with other statutes. If section 7(a)(2) applies to both discretionary and nondiscretionary actions, the provision is in conflict with the governing statutes, because it requires agencies to violate their other statutory responsibilities in complying with ESA requirements.

Conversely, if section 7(a)(2) applies only to discretionary actions, no conflict occurs because the agencies can comply with ESA requirements without violating their other statutory responsibilities. Congress did not address this conflict issue in section 7(a)(2). Congress did not indicate whether the provision applies to both discretionary and nondiscretionary action, or discretionary action only, nor did Congress otherwise provide clarification by employing the commonly-used phrase "notwithstanding the requirements of any other law." Thus, section 7(a)(2) does not define the scope of agency "action" in cases where potential conflicts with other statutory requirements may occur. The provision is silent on how to resolve such conflicts.

Since the ESA is silent on the subject of conflicts, the statute cannot be properly construed as imposing requirements that conflict with, and override, an agency's obligations under its governing statutes. Under rules of statutory construction, statutes should be construed harmoniously if possible, so that conflicts between them are avoided. *Morton v. Mancari*, 417 U.S. 535, 549 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). If the ESA were interpreted as imposing requirements inconsistent with other statutory requirements, the ESA would impliedly repeal the other statutory requirements, contrary to this Court's admonition that "repeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). *See also Mancari*, 417 U.S. at 550 ("[I]n the absence of an intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) ("[T]he intent of the legislature to repeal must be clear and manifest."). Thus, section 7(a)(2), properly construed, requires federal agencies to consult and avoid jeopardy to the extent – but only to the extent – that such actions are not inconsistent with specific mandates contained in the agency's governing statutes. Stated

differently, section 7(a)(2) requires federal agencies to take certain actions to the extent the agencies have discretion under their governing statutes to take the actions, and does not apply to the extent that the agencies lack such discretion.

Indeed, the ESA contains language specifically indicating that section 7(a)(2) does *not* apply where its requirements are inconsistent with other agency requirements under the governing statutes. Under section 7(b)(3)(A), the Secretary may propose "reasonable and prudent alternatives" to avoid jeopardy if the Secretary "believes" that action "can be taken" by the agency to avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A). Thus, if the Secretary believes that the action "can[not] be taken" by the agency under its governing statutes, the Secretary cannot propose alternatives requiring the agency to take such action. Since the Secretary's authority to propose alternatives goes hand in hand with the agency's obligation to consult, section 7(b)(3)(A) strongly suggests that section 7(a)(2) applies only where the agency has discretion to take the action under its governing statutes.

The proper analytical framework is that applied by this Court in *California v. United States,* 438 U.S. 645 (1978), which involved potential conflicts between federal laws defining the responsibilities of federal agencies to operate reclamation projects authorized by Congress. In *California*, this Court held that section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 – which provides that the federal operating agencies must "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water – requires the federal agencies to comply with state water rights laws in operating the projects, both in acquiring water rights for the projects and in distributing water from them. The Court also stated, however, that the federal agencies' obligation to comply with state laws under section 8 applies only to the extent not "inconsistent with other congressional directives," found either in the Reclamation Act or other federal laws. 438 U.S. at 668. Thus, as section 8 of the Reclamation Act imposes agency obligations to the

extent not in conflict with other specific federal laws, section 7(a)(2) of the ESA similarly imposes agency obligations to the extent not in conflict with other specific federal laws.[2]

A similar analytical framework was applied by this Court in *Department of Transportation v. Public Citizen, et al.*, 541 U.S. 752 (2004). There, this Court held that the Federal Motor Carrier Safety Administration, in preparing an Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, was not required to consider the environmental effects of removing a moratorium that barred entry of Mexican trucks into the United States, because the President had removed the moratorium and thus the agency had no discretion in deciding whether to remove it. The Court reasoned that the agency "lack[ed] the power" to act on whatever information might be developed in the environmental statement, and there was no "causal connection" between the proposed agency action and its environmental effects. *Id.* at 768. By the same reasoning, an agency is not required to consult under section 7(a)(2) if the agency lacks the power under its governing statutes to comply with ESA requirements, and no "causal connection" exists between the agency action and the effects on endangered species. The effects on endangered species, if they occur, are caused by the congressional directive mandating the agency to take certain actions, not the agency's action in complying with the congressional mandate.

The Ninth Circuit stated that its analysis of section 7(a)(2) was supported by the different language appearing in that provision and section 7(a)(1). As the Ninth Circuit observed, section 7(a)(1) requires agencies to "utilize their

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[2] To be sure, the *California* decision addressed the applicability of state water laws to federal reclamation projects, which involves significant constitutional issues concerning federal-state relations and property rights.

authorities" to conserve endangered species and section 7(a)(2) – while requiring agencies to consult and avoid jeopardy – does not employ the "utilize their authorities" phrase. 16 U.S.C. §§ 1536(a)(1), -(a)(2); *Defenders,* 420 F.3d at 965; App. 34a-35a, 46a. Congress may have employed the "utilize their authorities" phrase in section 7(a)(1) but not section 7(a)(2) because the former provision imposes an *affirmative* obligation to conserve endangered species and the latter imposes a *negative* obligation to avoid taking jeopardy-causing actions; the "utilize their authorities" phrase is more appropriate for an affirmative command than a negative one. Further, the requirements of sections 7(a)(1) and 7(a)(2) were originally part of the same provision, and Congress placed the requirements in separate provisions in 1978 without any apparent attempt to change their meanings.[3] Finally, section 2(c) of the ESA, which is a blanket provision spelling out Congress' policy in enacting the CWA, provides that federal agencies "shall utilize their authorities in furtherance of the purposes of this chapter," 16 U.S.C. § 1531(c). Thus, section 2(c) makes the "utilize their authorities" phrase broadly applicable to all statutory requirements, including section 7(a)(2). For these reasons, there is no basis for distinguishing between the provisions in terms of the relevance of agency obligations arising under other statutory authority.

In summary, section 7(a)(2) cannot be facially construed as requiring federal agencies to take actions that they do not have discretion to take under their governing statutes. In enacting the ESA, Congress directed federal

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[3] As originally enacted by Congress, sections 7(a)(1) and 7(a)(2) were part of a single provision, and the phrase "utilize their authorities" applied to the entire provision. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). In 1978, Congress amended the ESA by separating the two provisions, and explained in the legislative history that this revision merely restated "existing law." H.R. Conf. Rep. No. 95-1804, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486.

agencies to exercise their existing authority to consult and avoid jeopardy – to the extent the agencies have discretion to take these actions under their governing statutes – but did not create new authority and responsibilities that override the agencies' specific obligations under other statutory authority. The Ninth Circuit's conclusion – that since the ESA creates "additional authority," the additional authority overrides all other authority – is a *non sequitur*; the creation of a requirement that applies where potential conflicts do not occur does not imply the creation of a requirement where such conflicts do occur. *See Morton v. Mancari*, 417 U.S. 535, 549, 550 (1974). Thus, a proper construction of section 7(a)(2) avoids conflicts with other statutes, rather than, as the Ninth Circuit decision does, invites conflicts. The ESA requires federal agencies to act within their specific constraints under other laws, but not beyond them. Contrary to the Ninth Circuit decision, the ESA is not a superlaw that trumps all other statutes defining agency missions and responsibilities.[4]

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[4] The ESA contains safeguards to ensure that federal agency action will not harm endangered species or impair their habitats even though section 7(a)(2) may not apply to the agency action. Under section 9, no "person," including a federal agency, may "take" or "harm" an endangered species unless the Secretary has issued a permit authorizing an incidental take of the species. 16 U.S.C. §§ 1532(13), 1538(a)(1)(B), 1532(19). The Secretary has adopted regulations defining "harm" as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns. . . ." 50 C.F.R. § 17.3 (2000); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995). As the Ninth Circuit noted in another case, section 9 ensures that federal agency actions will not harm endangered species or impair their habitats regardless of whether section 7(a)(2) applies to the agency action. *Environmental Protection Information Center v. Simpson Redwood Company*, 255 F.3d 1073, 1083 (9th Cir. 2001).

II. THE SECRETARY'S REGULATION CLARIFIES THAT SECTION 7(a)(2) APPLIES TO ACTIONS THAT AN AGENCY HAS DISCRETION TO TAKE UNDER ITS GOVERNING STATUTES, AND IS ENTITLED TO DEFERENCE UNDER THIS COURT'S DECISIONS IN *CHEVRON* AND *MEAD*.

A. The Secretary's Regulation Construes Section 7(a)(2) as Applicable to Action that the Agency Has Discretion To Take Under its Governing Statutes.

As argued above, section 7(a)(2), construed facially, does not require federal agencies to consult and avoid jeopardy in cases where the agencies lack discretion to take these actions under their governing statutes. The Secretary has adopted a regulation clarifying that section 7 applies to "discretionary" federal action, that is, action that the agency has discretion to take under its governing statutes. Thus, the Secretary's regulation both clarifies and properly interprets the statute, and is entitled to deference by the courts.

In 1986, the Secretary adopted regulations defining federal agency actions that fall within the scope of section 7. 50 C.F.R. §§ 402.02, 402.03. The regulations provide, *inter alia*, that "Section 7 and the requirements of this part apply to all actions in which there is *discretionary Federal involvement or control.*" *Id.* at § 402.03 (emphasis added). This regulation interprets section 7(a)(2), which requires agencies to consult and avoid jeopardy, as applicable to agency actions involving "discretionary Federal involvement or control." Whether an agency has "discretion[]" under the regulation to consult and avoid jeopardy depends on whether such discretion is found in the agency's governing statutes. The regulation does not provide that such discretion is created by section 7(a)(2) itself; otherwise, all agency action would be "discretionary" and the regulation would have no practical meaning. Thus, the regulation provides that the ESA requirements apply to the extent the agency has discretion to meet

them under its governing statutes. If the agency lacks such discretion, the requirements do not apply.

This conclusion – that agency discretion must be found outside the ESA and is not created by it – is supported by another regulation adopted by the Secretary in 1986, which provides that the Secretary's authority to propose jeopardy-avoiding alternatives applies to the extent the alternatives "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." *Id.* at § 402.02. Thus, the Secretary cannot propose alternatives that are beyond an agency's "legal authority and jurisdiction," as defined in the agency's governing statutes. Since the Secretary cannot propose alternatives inconsistent with the agency's authority and jurisdiction, the agency is not required to consult with the Secretary before taking action falling within this category, because the agency's jeopardy-avoiding responsibilities go hand in hand with the Secretary's responsibility to propose jeopardy-avoiding alternatives.[5]

This Court has interpreted and applied the word "discretion" – the key concept in the Secretary's regulation – in other contexts as involving the exercise of judgment. For example, a writ of mandate lies only to compel a ministerial act, not a discretionary one. *See, e.g., Miguel v. McCarl*, 291 U.S. 442 (1934). This Court has interpreted the word "discretion" in that context as an exercise of judgment, as distinguished from a ministerial act. *Id.* at 451. Similarly, the Administrative Procedures Act (APA), pursuant to which this action was brought, precludes judicial review of "discretionary" federal actions but authorizes review of actions constituting an "abuse of

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[5] Similarly, section 7(b)(3)(A) provides that the Secretary's biological opinion must describe how the agency action "affects" the endangered species or its critical habitat, 16 U.S.C. § 1536(b)(3)(A), and the Secretary's regulation defines the "effects" of the agency action as those "caused" by the agency action. 50 C.F.R. § 402.02. If a federal statute requires an agency to take action that may affect an endangered species, the "cause" of the "effect" is the statute mandating the action, not the agency action complying with it.

discretion." 5 U.S.C. §§ 701(a)(2), 706(2). As in the mandate context, this Court has defined agency "discretion" under the APA as dependent on whether the agency exercises "judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971). As others have noted, agency discretion under the APA and other laws depends on whether the law allows the agency to make more than one choice, or instead limits the agency to a single choice. J. Rogers, "A Fresh Look at Agency 'Discretion,'" 57 TUL. L. REV. 776, 777 (1983); *see also* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed.), p. 332 ("discretion" defined as "individual choice or judgment"). If the governing statute directs that an agency take specific action and does not allow the agency to exercise judgment in deciding whether to take it, the agency has only one choice in carrying out its statutory responsibilities, and hence its action is not "discretionary."

Thus, although section 7(a)(2) does not address the subject of possible conflicts with other statutes – and must be construed under principles of construction as applicable only to discretionary actions – the Secretary's regulation does address the subject of conflicts and resolves them by construing the statute, properly, as limited to discretionary actions. The Secretary's interpretation thus converges with the proper statutory construction. Unlike the Ninth Circuit interpretation, which creates conflicts between statutory requirements, the Secretary's interpretation avoids conflicts. The Secretary's harmonious interpretation of these different statutory requirements is consistent with the principle that statutes must be construed, if possible, harmoniously rather than as in conflict. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974).

B. The Secretary's Regulation Is Entitled to Deference Under This Court's Decisions in *Chevron* and *Mead*.

The Secretary's regulation clarifying the meaning of the jeopardy clause is entitled to deference under this

Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as partially modified in *United States v. Mead Corp.*, 533 U.S. 218 (2001). According to *Chevron*, the courts follow a two-step process in determining whether to defer to federal agency interpretations of statutes they are charged with enforcing. First, the courts determine whether the statute is ambiguous; if the statute is not ambiguous, the courts construe the statute without deferring to the agency interpretation. *Chevron*, 467 U.S. at 842, 845. Second, if the statute is ambiguous, the courts defer to the agency interpretation if it is "reasonable." *Id.* "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843. Although *Chevron* and *Mead* may diverge regarding the appropriateness of deference in cases not involving formal agency rulemaking, both decisions support deference to agency interpretations that, as in this case, were adopted through the formal rulemaking process. As this Court has stated, "The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995). Since the Secretary's regulation interpreting section 7(a)(2) provides a reasonable – and indeed the most logical – interpretation of the provision, the regulation is entitled to deference under this Court's decisions in *Chevron* and *Mead*.

The Secretary's regulation is particularly worthy of deference because it limits rather than expands the regulatory jurisdiction of federal agencies, and thus limits the preemptive effect of federal law as applied to state and local laws regulating land use and water use. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), this Court expressly declined to grant *Chevron* deference to an Army Corps of Engineers regulation broadly interpreting the Corps'

jurisdiction to regulate "waters of the United States" under the CWA, 33 U.S.C. § 1362(7), in part because the Corps' broad definition of its jurisdiction would result in a "significant impingement of the States' traditional and primary authority over land and water use." 531 U.S. at 174. Thus, *Chevron* deference is more appropriate as applied to federal agency interpretations that, as here, limit federal intrusion into areas traditionally regulated by state and local governments under their police powers.

The Ninth Circuit, rather than deferring to the Secretary's regulation as required by *Chevron* and *Mead*, interpreted the regulation in a way that effectively nullified its meaning and effect. According to the Ninth Circuit, an agency's "discretionary involvement" within the meaning of the regulation is "coterminous" with the statutory reference to actions "authorized, funded, or carried out" by the agency. *Defenders,* 420 F.3d at 969; App. 43a. The regulation, the court stated, merely provides a "gloss" on the statutory phrase. *Id.* at 967; App. 39a. As noted earlier, however, the court interpreted the statutory phrase as creating "additional authority," even though such authority is inconsistent with the requirements of the agency's governing statute, in this case the CWA. *Id.* at 967; App. 38a-39a. Thus, under the Ninth Circuit analysis, the statute creates "additional authority" that overrides other statutory obligations, and the agency's "discretion" under the regulation is the same as the "additional authority" created by the statute. Under the court's reasoning, section 7(a)(2) *itself* creates agency "discretion" to comply with its requirements, even though the section 7(a)(2) requirements are inconsistent with the agency's other statutory obligations. If, as the Ninth Circuit reasoned, section 7(a)(2) itself creates agency "discretion," then *all* agency action affecting endangered species is necessarily "discretionary," and the regulation has no practical effect in defining the scope of the statute as it applies to agency action. The Ninth Circuit, rather than deferring to the agency regulation as required by *Chevron* and *Mead*, interpreted the regulation as meaningless.

Applying the Secretary's regulation to the instant case, the EPA has no "discretionary" authority to disapprove the Arizona program under the CWA. Section 402(b) of the CWA expressly provides that the EPA "shall approve" the Arizona program if it meets the statutory criteria of the CWA, 33 U.S.C. § 1342(b), as the Arizona program does. The Ninth Circuit did not suggest that the EPA has any discretion under the CWA to disapprove the Arizona program, and acknowledged that none of the parties have challenged the Arizona program on that ground. *Defenders*, 420 F.3d at 963 n. 11; App. 31a. Since the EPA lacks discretion in deciding whether to approve the Arizona program, section 7(a)(2) does not apply to the EPA's action.

C. The Ninth Circuit Decision Goes Beyond Federal Appellate Case Authority by Construing an Agency's "Discretion" as Independent of its Obligations Under Its Governing Statutes and Other Authorities.

The Ninth Circuit decision goes beyond existing federal appellate case authority by holding that section 7(a)(2) itself creates agency discretion that overrides the agency's obligations under its governing statutes. Although several appellate decisions have considered whether agency action is "discretionary" under the Secretary's regulation, these decisions have considered whether such agency discretion is found in the agency's governing statutes or other authorities outside the ESA. None have held, at least of which we are aware, that section 7(a)(2) itself creates such discretion.

For example, the Ninth Circuit held in one case that the Bureau of Land Management did not have discretion in a right-of-way agreement to prevent a logging company from building a road that may affect endangered species, because the agreement did not authorize the agency to prevent construction of the road in order to benefit endangered species. *Sierra Club v. Babbitt*, 65 F.3d 1502 (1995).

The Ninth Circuit held in another action that the National Marine Fisheries Service had discretion to impose conditions in fishing permits for the protection of endangered species under the High Seas Fishing Compliance Act, 16 U.S.C. §§ 5501-5509, because that statute granted authority to the agency to impose such conditions. *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003). The District of Columbia Circuit held in another action that the Federal Energy Regulatory Commission did not have discretion to impose conditions in annual licenses for the protection of endangered species, because the Federal Power Act, 16 U.S.C. §§ 791a-828c, did not authorize such conditions to be imposed in annual licenses. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992). The Ninth Circuit held in another action that the Forest Service had discretion to consult and avoid jeopardy before approving Land Resource Management Plans, because the plans provided for "ongoing agency activity." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).[6]

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[6] There are other examples of federal appellate decisions that have considered agency "discretion" under the Secretary's regulation by reference to agency governing statutes or other such authorities. *See, e.g., Ground Zero Center v. U.S. Department of the Navy*, 383 F.3d 1082 (9th Cir. 2004) (Department of the Navy not required to consult regarding effects of submarine missile upgrade program because President made decision to select program site); *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (Fish and Wildlife Service lacked discretion to reinitiate consultation to consider effect of incidental take permit on endangered species, because permit did not authorize consideration of effects of species not listed when permit issued); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) (Bureau of Reclamation required to consult before renewing water delivery contracts, because contracts afford discretion); *American Forest and Paper Ass'n v. United States*, 137 F.3d 291 (5th Cir. 1998) (EPA not required to consult regarding approval of state application to administer NPDES program because CWA requires approval if state program meets specified

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Although some of these decisions held that the agency had discretion to consult and avoid jeopardy and others held that the agency lacked such discretion – and although the decisions appear to diverge in terms of whether such agency discretion should be broadly or narrowly construed[7] – all of these decisions examined the agency's discretion in

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criteria in CWA); *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979) (Secretary of Interior required to consult before approving lease sales under Outer Continental Shelf Lands Act, because agreements require "future action" and have "implied condition" that agreements will not violate ESA).

[7] In our view, some of the above-cited decisions improperly applied the Secretary's regulation in broadly construing agency discretion under other statutes and authorities. In one case, for example, the Tenth Circuit ruled, in a 2-1 panel decision, that the Bureau of Reclamation's contracts with water users relating to the San Juan-Chama Project in New Mexico afforded discretion for the Bureau to reallocate project water from the contractors for the benefit of the endangered silvery minnow – even though the project imported water from a Colorado River tributary into the Rio Grande and the imported water had no connection with the Rio Grande, which was the minnow's natural habitat. The court stated that the Bureau's discretion was contained in a "shortage clause" that immunized the United States from liability for shortage conditions caused by drought or "other causes"; in the panel majority's view, the "other causes" included the ESA requirements. *Silvery Minnow v. Keyes*, 333 F.3d 1109, 1127-1131 (10th Cir. 2003), *vacated as moot*, 855 F.3d 1215 (2004). *See also O'Neill v. United States*, 50 F.3d 677, 680-681 (9th Cir. 1995). A contractual provision *immunizing* the United States from liability for water shortages caused by drought or "other causes" cannot be properly construed as *creating* discretion for the United States to reallocate contracted-for water in order to benefit endangered species.

In a similar vein, some of the above-cited decisions held that federal agencies had discretion to consult and avoid jeopardy because the governing statutes provided for "ongoing agency activity." *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979). The existence of "ongoing" agency authority does not, itself, provide discretion for an agency to consult and avoid jeopardy notwithstanding other legal requirements. Whether an agency has such discretion depends on the specific nature of the agency's obligations under the relevant statutes governing the agency action.

terms of the agency's governing statutes or other authorities, and none concluded that the ESA itself afforded such discretion. The Ninth Circuit decision in this case is the first, and only, federal appellate decision of which we are aware that construes section 7(a)(2) itself as the source of agency discretion under the Secretary's regulation.

D. The Ninth Circuit's Decision Is Not Supported by this Court's Decision in *Tennessee Valley Authority v. Hill.*

In support of its decision, the Ninth Circuit cited this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). 420 F.3d at 964-965; App. 32a-36a. In *Hill*, the Court held that section 7(a)(2) precluded the Tennessee Valley Authority (TVA) from completing construction of the nearly-completed Tellico Dam, because the Secretary of the Interior had determined that completion of the dam would harm the critical habitat of the endangered snail darter. 437 U.S. at 161, 184. *Hill* was decided in 1978, prior to the Secretary's adoption of the 1986 regulation, which interpreted section 7(a)(2) as limited to "discretionary" federal actions. Thus, *Hill* had no opportunity to consider the meaning, effect or validity of the Secretary's regulation, as several courts have noted. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995); *Platte River Whooping Crane v. Federal Energy Regulatory Comm'n*, 962 F.2d 27, 34 (D.C. Cir. 1992); *Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53, 67 (D.D.C. 2003). Further, since *Hill* was decided before this Court's decisions in *Chevron* and *Mead*, which were issued in 1984 and 2001 respectively, *Hill* could not have considered the appropriateness of judicial deference to reasonable agency interpretations of statutes, apart from the fact that the agency interpretation had not yet occurred.

More importantly, *Hill* did not consider the issue, presented here, of whether section 7(a)(2) overrides potentially conflicting agency obligations under the agency's governing statutes. In *Hill*, the TVA had argued that its completion of a nearly-completed dam did not constitute

agency "action" within the meaning of section 7(a)(2), and therefore that the provision did not apply. 437 U.S. at 168. The Court rejected the argument, holding that the completion of a nearly-completed dam constitutes agency "action" within the meaning of the provision. *Id.* The Court did not consider, however, whether agency "action," as used in section 7(a)(2), includes both discretionary and non-discretionary actions that the agency takes under its governing statutes, or instead includes only discretionary action. Indeed, no statutory requirements that might have specifically required the TVA to complete the dam – and that might have limited the agency's discretion *not to* complete the dam – were identified or mentioned in the Court's opinion. The Court did not consider, for example, whether the congressional statute authorizing the dam may have limited the agency's discretion not to complete construction – perhaps because the authorizing statute contained no such provision. Although Congress had appropriated funds to build the dam, Congress had not mandated that the dam be built in that particular location. The Court's conclusion that the TVA's activities constituted agency "action" within the meaning of section 7(a)(2) did not mean that such action was not subject to limitations on agency authority contained in other statutes. Thus, *Hill* did not consider the issue raised here.

Indeed, the *Hill* decision contained statements indicating that the Court did *not* mean to suggest that section 7(a)(2) overrides agency obligations under the governing statutes. The Court stated that section 7 "'substantially [amplifies] the obligation of [federal agencies] to take steps *within their power* to carry out the purposes of this act.'" 437 U.S. at 183, *quoting from* 119 Cong. Rec. 42913 (1973) (Rep. Dingell) (emphasis added; original brackets in decision). This statement indicates that the Court held only that section 7(a)(2) requires agencies to take actions "within their power" under other statutes, not that they must take actions that exceed such powers.

III. A CONSTRUCTION THAT SECTION 7(a)(2) OVERRIDES OTHER AGENCY OBLIGATIONS WOULD REQUIRE THE COURTS TO DIFFERENTIATE BETWEEN DIFFERENT KINDS OF AGENCY OBLIGATIONS IN ORDER TO AVOID THE ABSURD RESULTS CAUSED BY SUCH A CONSTRUCTION.

If, as the Ninth Circuit ruled, section 7(a)(2) imposes requirements that override agency obligations under other laws and authorities, the courts would be required to differentiate between different kinds and sources of agency obligations in order to avoid the absurd results caused by such a construction. Otherwise, section 7(a)(2) would be construed as overriding agency obligations under circumstances where Congress, in enacting the CWA, could not have conceivably intended for the provision to apply. The Ninth Circuit construction would place the courts on a slippery slope by requiring them to determine which agency obligations are subject to ESA requirements and which are not, a task that is appropriate for legislative but not judicial consideration.

A. Judicial Decrees

For example, if section 7(a)(2) overrides agency obligations arising under other laws and requirements, as the Ninth Circuit held, then the provision presumably would override agency obligations based on judicial decrees, where the courts have adjudicated rights and required federal agencies to comply with such rights. Under principles of *res judicata*, federal agencies are required, as all are required, to comply with judicial decrees, and cannot modify or seek modification of the decrees for the purpose of asserting additional claims or rights. *See, e.g., Nevada v. United States*, 463 U.S. 110 (1983) (*res judicata* as applied to water rights adjudication decree bars United States from asserting additional water rights claims on behalf of Indian tribes). Certainly Congress did not intend, in enacting the ESA, to authorize federal agencies to modify, or seek modification of, judicial

decrees in order to benefit endangered species. Under the Ninth Circuit decision, however, an agency presumably would have discretion to comply with ESA requirements even though such compliance may be inconsistent with judicial decrees, because, as the court held, the ESA creates "additional authority" that overrides other authority applicable to the agency action.

A salient example of how the Ninth Circuit decision might potentially affect agency obligations based on judicial decrees may be found in the U.S. Bureau of Reclamation's operation of water delivery projects on the Colorado River. The Colorado River provides a major source of water supplies for the seven basin states (New Mexico, Colorado, Wyoming, Utah, Nevada, Arizona and California) through which it flows. *Arizona v. California*, 373 U.S. 546, 552 (1963). The Bureau of Reclamation operates several water projects on the river – including Hoover Dam and Glen Canyon Dam – and has entered into water delivery contracts with major users in the seven basin states, who include many of the West's largest cities and major farming regions. Boulder Canyon Project Act, 45 Stat. 1057 (1928) (Hoover Dam); Colorado River Storage Project Act, 43 U.S.C. § 620 *et seq.* (Glen Canyon Dam). This Court has issued a major decision and decree that establishes the apportionments of each of the lower basin states (Nevada, Arizona and California) to Colorado River water, and that requires the Bureau to comply with these apportionments in operating the projects and signing contracts with water users. *Arizona*, 373 U.S. at 564-565 (decision), 373 U.S. at 340, 342 (decree), 126 S.Ct. 1543 (2006) (consolidated decree). The Bureau's operation of the projects is governed not only by the Supreme Court decree, but also by many other authorities – federal statutes governing the Bureau's operational responsibilities, an international treaty with Mexico, a congressionally-approved interstate compact, the Bureau's contracts with water users in the seven basin states, and other authorities. *See, e.g.*, C. Meyers, "The Colorado River," 19 STAN. L. REV. 1 (1966). This combination of decrees, treaties, statutes, contracts, and other authorities is

collectively known as the Law of the River. *Id.* The Ninth Circuit decision, according to its logic, would hold that section 7(a)(2) trumps all components of the Law of the River – even including the Supreme Court decree – except apparently, as will be explained later, the Bureau's contracts with the water users. As a federal district court recently stated, in holding that section 7(a)(2) does not apply to the Bureau's operation of the projects as they affect endangered species in the Mexican Delta, "it seems unlikely that any case will present facts that more clearly make an agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water." *Defenders of Wildlife v. Norton,* 257 F.Supp.2d 53, 69 (D.D.C. 2003).

B. Express Legislative Commands

The Ninth Circuit's decision, according to its logic, might also require federal agencies to consult under section 7(a)(2) even where Congress has *expressly* directed an agency to take specific action regardless of its effect on endangered species.[8] If, as the Ninth Circuit reasoned,

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[8] This is not an altogether hypothetical example. The Bureau of Reclamation operates the San Juan-Chama Project in New Mexico, and has signed contracts to deliver project water to urban and agricultural users. The Tenth Circuit held that a biological opinion issued by the Fish and Wildlife Service (FWS) failed to adequately protect the endangered silvery minnow, and mandated the Bureau to reallocate a portion of the water from the contractors in order to benefit the minnow. *Silvery Minnow v. Keyes,* 333 F.3d 1109 (10th Cir. 2003), *vacated as moot,* 355 F.3d 1215 (2004). Congress subsequently enacted legislation providing that the Bureau does not have authority to reduce project water deliveries in order to benefit the minnow, and that the Bureau's compliance with the FWS biological opinion shall be deemed to "fully" satisfy ESA requirements until 2013. Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, § 208(a), 117 Stat. 1827 (Dec. 1, 2003). This legislation substantially overrode, and partially mooted, the Tenth Circuit decision, and the Tenth Circuit subsequently vacated its decision. Since Congress has specifically

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section 7(a)(2) creates "additional authority" that overrides agency authority under other statutes and authorities, this "additional authority" presumably would apply even though Congress has expressly provided that it does not apply. To be sure, the Ninth Circuit, faced with this issue, might not apply its reasoning where Congress has expressly decided that ESA requirements do not apply. Nonetheless, the logic of the court's decision would lead to the absurd result that the ESA requirements might apply even where Congress has directed otherwise. To avoid this absurd result, the courts would be required to differentiate between different kinds and sources of agency obligations, depending on the source or clarity of the obligations, and on whatever other rules the courts fashion for making these distinctions. This is an appropriate inquiry for the legislative rather than the judicial branch.

C. "Earlier Agency Commitments"

The Ninth Circuit properly recognized that section 7(a)(2) does not override at least one kind of agency obligation arising outside the ESA. The court stated that the provision requires an agency to consult and avoid jeopardy to the extent these requirements are "both within its decisionmaking authority and unconstrained by *earlier agency commitments.*" *Defenders,* 420 F.3d at 967; App. 38a-39a (emphasis added). These "earlier agency commitments" presumably consist of prior agency actions granting private rights, such as contracts, licenses and permits, where authority was not reserved to modify the rights for the benefit of endangered species. Thus, under the Ninth Circuit decision, section 7(a)(2) overrides all statutory and legal requirements defining agency action, except for requirements that the agency itself has created

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decreed that the FWS biological opinion "fully" satisfies ESA requirements, the Bureau of Reclamation presumably has no authority to comply with section 7(a)(2) requirements in operating the project.

by entering into contracts, issuing permits, and taking similar action.

The Ninth Circuit correctly concluded that section 7(a)(2) does not apply to and override earlier agency "commitments," such as those found in contracts and permits. Indeed, several federal appellate courts, including the Ninth Circuit, have held that section 7(a)(2) does not apply in such circumstances, absent a reservation of authority for the agency to modify the commitments for endangered species purposes. *See, e.g., Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (federal agency did not have discretion to modify right-of-way agreement for benefit of endangered species, because agreement did not provide for such modification); *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (FWS did not have discretion to reinitiate consultation to consider effect of incidental take permit on an endangered species not listed when permit issued, because permit did not authorize consideration of such effects). Thus, for example, if the Bureau of Reclamation enters into contracts with water users, which obligate the Bureau to deliver water from federal reclamation facilities to the users, the Bureau does not have discretion to reallocate the water for the benefit of endangered species, absent a reservation of authority in the contracts to reallocate the water for this purpose.[9] The Ninth Circuit in this case, following its own

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[9] The Tenth Circuit, in a subsequently-vacated 2-1 decision, held that the doctrine of "unmistakable terms," as enunciated by this Court in *United States v. Winstar*, 518 U.S. 839 (1996), authorizes the Bureau of Reclamation under section 7(a)(2) to reallocate water from a federal reclamation project for the benefit of endangered species, notwithstanding that the Bureau may have entered into contracts with water users that did not authorize reallocation for this purpose. *Rio Grande Silvery Minnow v. Keyes*, 333 F.3d 1109, 1139-1141 (10th Cir. 2003) (concurring opinion signed by panel majority), *vacated as moot*, 355 F.3d 1215 (2004). Under the doctrine of unmistakable terms, Congress retains the sovereign power to modify contracts by subsequent legislation, and does not waive this right unless it does so by "unmistakable terms." *Winstar*, 518 U.S. at 877-878. The Tenth Circuit misapplied the unmistakable terms doctrine. The doctrine would apply to the Bureau of Reclamation's

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precedents, properly recognized that section 7(a)(2) does not override prior agency "commitments."

Still, the Ninth Circuit decision – by holding that section 7(a)(2) does not apply to agency "commitments" but does apply to agency obligations arising under other sources of authority – creates an anomaly regarding the kinds and sources of agency authority that are superseded by section 7(a)(2) and those that are not. The court held, in effect, that section 7(a)(2) applies even though this may contravene other legal requirements – perhaps even requirements based on judicial decrees and express legislative commands – but not if its application would contravene agency "commitments." Under the Ninth Circuit view, section 7(a)(2) trumps all agency obligations except for the agency's own "commitments." Under the terms of the statute itself, there is no basis for distinguishing between different agency obligations depending on their source. Rather, section 7(a)(2), as clarified by the Secretary's regulation, applies to "discretionary" federal action, regardless of whether the discretion is found in congressional statutes, judicial decrees, agency "commitments," or something else. The Ninth Circuit's interpretation of the provision creates anomalies that are unsupported either by the statute or the regulation, and would place the courts on a slippery slope in fashioning rules to avoid the anomalies.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Ninth Circuit's decision below should be reversed.

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contracts only if Congress, in enacting the ESA, intended to modify the contracts as necessary to protect endangered species. As argued above, the ESA does not modify, or authorize modification of, existing agency contracts, but instead provides that the ESA requirements apply only where the contracts themselves provide such discretion to the Bureau of Reclamation. Further, even if the unmistakable terms doctrine otherwise applies, the United States would be liable in damages to the contracting parties if it breaches the contracts by reallocating the water.

Respectfully submitted,

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479a

Nos. 06-549; 06-340

In The Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE *et al.*,

Respondents.

NATIONAL ASSOCIATION OF HOMEBUILDERS *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF JARED M. DIAMOND, THOMAS EISNER, GORDON H. ORIANS, STUART L. PIMM, PETER H. RAVEN, DAVID S. WILCOVE, AND EDWARD O. WILSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are prominent scientists in the fields of biology, botany, zoology, and ecology.[1] Their expertise enables them to understand and explain the ecological and economic importance of protecting imperiled species, as well as to explain the role science plays in the Endangered Species Act's species conservation scheme. Understanding the importance of biodiversity is necessary to appreciate fully why Congress enacted broad protections for species facing extinction. Additionally, appreciating lawmakers' emphasis on science as the foundation for the Endangered Species Act's key provisions illuminates the inherent inconsistency of reading into the statute a legally-based limitation on the scope of federal agencies' duties under section 7.

Amici include, in alphabetical order:

Jared M. Diamond is Professor and Vice Chair, Department of Physiology, UCLA Medical School. Dr. Diamond is an explorer of New Guinea bird fauna, and inventor of the concept of assembly rules in community organization. Since 1977, he has devoted much of his time to popular science writing including the bestselling books *Guns, Germs and Steel: The Fates of Human Societies*, for which he was awarded the Pulitzer Prize, and *Collapse: How Societies Choose to Fail or Survive*.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of consent with the Clerk of the Court.

Cornell Institute for Research in Chemical Ecology (CIRCE). He is a world authority on animal behavior, ecology, and evolution, and is one of the pioneers of chemical ecology, the discipline dealing with the chemical interactions of organisms. He is a member of the National Academy of Sciences, and received the National Medal of Science in 1994.

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SUMMARY OF THE ARGUMENT

Amici are scientists who have dedicated their professional lives to studying species and ecosystems and the ways in which human actions can destroy – or save – these precious resources. Congress too recognized the importance of biodiversity and so enacted the Endangered Species Act (ESA), 16 U.S.C. §1531 et seq., a comprehensive, science-based approach to protecting the United States' most vulnerable species and the ecosystems upon which these species depend. Based on their extensive

studies and experience, *amici* provide in this submission a summary of some of the many benefits of biodiversity. Any actions, regardless of their classification or type, that adversely impact other native species will as a scientific matter lead to continued erosion of the enormous ecological, economic, scientific, aesthetic, cultural, and health benefits that biological resources provide, and that lawmakers have repeatedly and explicitly recognized.

Reversing course from earlier legislation that gave significant leeway to human actions that imperil other species, Congress enacted stringent, encompassing protections in the ESA designed to halt and reverse the accelerating trend toward species extinctions. Acknowledging that federal actions can threaten other species, the ESA mandates that federal agencies proceed with caution in order that their actions do not contribute to species' decline. Petitioners' effort to read a broad exception into application of this conservative approach threatens to significantly weaken federal protections for threatened and endangered species and the myriad benefits they represent – something that Congress itself has consistently refused to do.

Section 7 of the ESA also directs that science guide implementation of its provisions, with the pointed exception of possible exemptions from section 7's prohibitions granted by a high-level policy committee after a deliberate and exacting process. *Amici* firmly believe that interpreting section 7 as inapplicable to a host of "nondiscretionary" federal actions is directly at odds with the Endangered Species Act's emphasis on science and precaution as

touchstones of prudent management of this Nation's precious biological heritage.

ARGUMENT

I. CONSERVATION OF ENDANGERED AND THREATENED SPECIES PROVIDES SOCIETY WITH MYRIAD IMPORTANT BENEFITS.

President Nixon signed the Endangered Species Act (ESA) into law on December 28, 1973, declaring that "[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, or value to scholars, scientists, and nature lovers alike and it forms a vital part of the heritage we all share as Americans." B. Burgess, *Fate of the Wild: the Endangered Species Act and the Future of Biodiversity* at 3 (2001). This Court termed the ESA the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). It provides a means whereby "the ecosystems upon which endangered species and threatened species depend may be conserved, [and] . . . a program for the conservation of such endangered species and threatened species. . . ." The Endangered Species Act, 16 U.S.C §1531(b) (2000). As such, the statute takes a comprehensive scientific approach to conserving biodiversity, seeking to protect habitat and ecosystems crucial to protected species as well as promoting conservation of species themselves.

In its findings that explain the basis for enacting legislation to conserve species facing extinction, lawmakers declared that "these species of fish, wildlife, and plants

are of aesthetic, educational, historical, recreational, and scientific value to the Nation and its people." *Id.* at §1531(a)(3). In this section of their brief, *amici* provide information to demonstrate more precisely why Congress was absolutely correct in pointing out the myriad ways in which biodiversity provides benefits to society – and thus why lawmakers were justified in enacting a statute that contains comprehensive and broadly inclusive mandates to protect these benefits. Somewhat ironically, Congress also noted in the ESA's findings that economic growth and development untempered by adequate concern and conservation has led to many species' decline and even extinction. *Id.* at §1531(a)(1). While this is certainly true, advancements over the past three decades in both our knowledge and technology have demonstrated that species and ecosystems are in fact also crucial to the Nation's economic well-being, and are often the raw materials of socially beneficial economic growth and development. The following sections therefore also explain why broad protections for other species also make a great deal of sense from a purely economic standpoint.

It is telling that Congress, despite frequent urgings from some quarters to the contrary, has for many years refused to significantly weaken the ESA's broad protections for imperiled species. *Amici* submit that Representative Schneider provided perhaps the best explanation for this steadfast support for the ESA when she noted during 1985 reauthorization hearings that "[e]very time we reauthorize this legislation another set of 'user' groups comes before us to complain about the problems they are having because of the Endangered Species Act. I am sure these concerns are very real, but we must not lose sight of what is at stake here. The very survival of this planet

depends in large part on maintaining species diversity." *Endangered Species Act Reauthorization Hearings Before the House Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 3 (1985).

A. Ecological and economic importance of conserving listed species and the ecosystems upon which they depend.

At the most basic level, biodiversity is crucial to humankind's long term survival because we depend on a vast array of organisms to provide us with food, oxygen, nutrient recycling and other important life-sustaining functions. Scientists refer to these functions as ecosystem services. Scott Freeman & John C. Herron, *Evolutionary Analysis* 739 (1998); G. Daily et al., *Benefits Supplied to Human Societies by Natural Ecosystems*, 2 Issues in Ecology 1-18 (1997); *see also* Richard C. Primack, *Essentials of Conservation Biology* at 79-100 (1998). Such biological functions and services essential to human survival and welfare include soil formation, breakdown of wastes, and recycling of nutrients back into the soil which eventually provides humankind with food and other benefits. At a local scale, forests protect watersheds and thus the water supplies of many towns and cities, wild insect populations pollinate crops, and coastal ecosystems are the nurseries of commercially important fish stocks. Globally, vast ecosystems such as tropical rainforests, grasslands, wetlands, and forests also regulate composition of the atmosphere, perpetuate the water cycle, and have an important effect on climate. Freeman & Herron, *supra,* at 739. In 1997, scientists estimated the total economic

value of the renewable ecosystem services important to human health and welfare as between $16 and $54 trillion per year.[2] R. Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 Nature 253-260 (1997).

Individual species also play an important role in providing these ecosystem services. Some organisms, termed keystone species, play disproportionately important roles (relative to their numerical abundance) in the ecosystems in which they occur. Gray wolves, now protected under the ESA, provide an excellent example of a keystone species and its importance to the health of an entire ecosystem. David Todd, *Wolves – Predator Control and Endangered Species Protection: Thoughts On Politics and Law*, 33 S. Tex. L. Rev. 459, 478 (1992). The historic range of wolves once covered most of the United States. However, since they were thought of as pests, wolves were eradicated from most of the United States by the early 20th century. Hunters shot the last wolf in Yellowstone in 1926. *See* William J. Ripple and Robert L. Beschta, *Wolves and The Ecology of Fear: Can Predation Risk Structure Ecosystems*, 54 BioScience 755, 759 (2004). Seventy years later, FWS reintroduced wolves back into Yellowstone pursuant to the Endangered Species Act. Over the past

[2] The study's authors calculated that the estimated annual value of ecosystem services at the time, $33 trillion, was 1.8 times the global gross national product. Primack, supra, at 103. In the U.S., there is a growing awareness of the economic and practical importance of ecosystem services. In 1997 for example, New York City decided to spend over a billion dollars to purchase forested lands in the Catskills watershed to provide the city with drinking water – thereby avoiding $6 to $8 billion in costs for a mechanical water filtration system. See E.O. Wilson, *The Future of Life* 107-08 (2002).

decade, scientists have observed wolves changing ecosystem function in the greater Yellowstone area for the better. Wolf predation and hunting activities have reduced ungulate populations and changed herd movements; with less browsing pressure, riparian vegetation and aspen forest have increased significantly, improving riparian shade, stabilizing stream banks, and in turn increasing beaver and native fish populations. *Id.* Wolves are thus helping to restore lost ecosystem function and increase other wildlife populations in America's flagship national park, thus also providing benefits for humans ranging from improved water flows and reduced erosion to enhancing visitors' enjoyment of the park. *Id.*; *see also* Douglass Smith et al., *Yellowstone after Wolves*, 53 BioScience 330 (2003).

Other examples of such relationships are more subtle but no less important. Though many people view insects as trivial or even unpleasant species, they often perform invaluable ecosystem services. For example, an estimated 100,000 different species, including bees and flies, provide no-cost pollination services, including those that sustain a significant percentage of the globe's croplands. In the United States, the agricultural value of wild native pollinators is estimated in the billions of dollars per year. *See* Daily, *supra,* at 12. The continued availability of these natural pollination services depends on conserving the ecosystems upon which these species depend – a key goal of the Endangered Species Act.

Courts have both recognized and relied upon the economic and ecological value of wild species, including those protected by the ESA. For instance, in *National Association of Home Builders of the United States v. Babbit*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), the District of Columbia Court of Appeals

emphasized the importance to its ecosystem of the descriptively named Delhi Sands flower loving fly *(Raphiomidas terminatus abdominalis)*. The court in that case noted that "[t]he Committee Reports on the ESA reveal that one of the primary reasons that Congress sought to protect endangered species from 'takings' was the importance of the continuing availability of a wide variety of species to interstate commerce." *Id.* at 1053-54. Quoting from the House report upon the enactment of the ESA, the Court of Appeals emphasized lawmakers' discussion of the potential future commercial uses of genetic and biological resources, concluding that "the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *Id.*; *see also* Michael C. Blumm, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision,* 34 Envtl. L. 309 (2004) (discussing the importance of biodiversity in the case). In also upholding the federal government's constitutional authority over endangered species found within a single state, the Fourth Circuit in *Gibbs v. Babbitt*, 214 F.3d 483, 494 (4th Cir. 2000), *cert. denied*, *Gibbs v. Norton*, 531 U.S. 1145 (2001), noted that recovery of red wolves could lead to tourism-related economic improvements running into the hundreds of millions of dollars.

B. Scientific value to the Nation and value to the health of its people.-

To the surprise of many in this technological age, humans garner a considerable amount of both health benefits and wealth directly from other species. For example, scientists initially derived a key ingredient of aspirin, perhaps the most widely used pharmaceutical in

the world, from a wild plant, meadowsweet. E.O. Wilson, *The Diversity of Life* 283 (1992). Cancer-fighting medicines made from compounds first isolated from rosy periwinkles (*Catharanthus roseus*) in Madagascar and from Pacific yew trees (*Taxus occidentalis*) – which are found in old growth forests in the northwestern U.S. – help thousands of patients each year. *The Diversity of Life*, *supra*, at 284; Freeman & Herron, *supra*, at 742. Currently, approximately 25% of all prescription drugs dispensed by pharmacies in the United States are based on substances first derived from plants, 13% come from microorganisms, and 3% from animals. *The Diversity of Life*, *supra*, at 283-84. Though science can now synthesize many of these compounds artificially, the chemical structure and properties of medicinal substances discovered in nature are often so novel that chemists operating in labs would almost certainly never have thought to create them; hence it is crucial to preserve wild species and the biochemical innovations they represent.[3] In addition to their incalculable health

[3] Lawmakers in fact anticipated such benefits when they passed the Endangered Species Act to protect wild species for future generations. The House report accompanying the final bill noted that "[w]ho knows or can say what potential cures for cancer or other scourges present or future, may lie locked up in the structure of plants which may yet be discovered, much less analyzed. Sheer self interests implore us to be cautious." TVA, 423 U.S. at 178 (quoting H.R. Rep. No. 93-412 at 4-5 (1973)). See also The National Biological Diversity Conservation and Environmental Act: Hearings on H.R. 4335 before the Subcomm. on Natural Resources, Agricultural Research and Environment of the House Comm. on Science, Space, and Technology, 100th Cong., 2d Sess. 342 (1988) (testimony of the American Pharmaceutical Association that "[i]t is alarming to consider that years ago, there might have existed a plant or microorganism that could have cured AIDS or other diseases, but that through inaction, that species became extinct.").

benefits, the commercial value of over-the-counter drugs directly extracted from plants alone was estimated in 1998 to be $20 billion in the United States and $84 billion worldwide. E.O. Wilson, *The Future of Life* 119 (2002).

In addition to the medical value that biological resources offer to humankind, wild organisms also offer improvements to agricultural practices and pest control. Agricultural practices focused on a limited number of single species monocultures, as Congress recognized, are extremely susceptible to failure as a result of disease, pests and other catastrophic natural disasters. *See* H.R. Rep. No. 259, 102nd Cong., 1st Sess. 14 (1991). This risk is particularly acute in an age of major industrial-scale agriculture, where thousands of acres may be cultivated with genetically identical individuals. Therefore, diverse gene pools and an abundance of wild organisms are essential to the ability to protect existing crops and produce new strains of food crops, as well as to development and maintenance of an efficient pest control system and disease resistance in our food supply.

In his book *The Diversity of Life*, *amicus* E.O. Wilson observed that "[m]erely the attempt to solve the biodiversity crisis offers great benefits never before enjoyed, for to save species is to study them closely, and to learn them well is to exploit their characteristic in novel ways." *The Diversity of Life, supra,* at 306 (1992). This illuminates the myriad possibilities that conserving the great variety of species have to offer to science. For example, some of the most important scientific discoveries in recent years were achieved with the help of extremophile bacteria living in thermal springs within Yellowstone National Park. In 1983, scientists succeeded in using one of the organisms found in this extreme environment, *Thermus aquaticus*, to

produce a heat resistant enzyme needed for synthesis of DNA. Ploymerase Cahin reaction, the manufacturing process developed as a result, is the foundation for genetic mapping. Such mapping of the human genome has become extremely important for medical purposes, as well as for uses such as crime detection and forensic medicine. *The Future of Life, supra,* at 127; *See also Yellowstone Thermophiles Conservation Project,* http://www.wfed.org/projects/yellowstone/project.htm (last visited March 21, 2007). Through protecting biodiversity and species within Yellowstone National Park, scientists were able to discover and use this unique organism, as a result opening the door to tremendous scientific, medical, and other benefits even yet untold.

Apart from utilitarian benefits, species are invaluable from a scientific perspective because of their great intrinsic value as repositories of the history and accumulated experiences of millions of previous life forms through species' continuous, evolutionary adaptation to a changing environment. Primack, *supra,* at 129. By conserving species, we can protect a storehouse of knowledge for future generations. Hawaiian honeycreepers, a family of birds known as the Drepanididae, serve as a prime example of the evolutionary and scientific significance of species. Honeycreepers are one of the best known examples of adaptive radiation. Found only in the Hawaiian Islands, this family consisted of over 45 species at the time the Polynesians settled Hawaii 2,000 years ago. All of these birds are believed to have evolved from a single species that arrived on the island chain by chance. Each species within the family has a specialized bill related to the type of food eaten by that particular species. For example, long billed honeycreepers feed on nectar, and short billed

honeycreepers specialize in cracking seeds. Primack, *supra*, at 30; *see also* J. Scott et al., *Conservation of Hawaii's Vanishing Avifauna*, 38 BioScience 232-253 (1988). The diversity of honeycreepers thus offers invaluable insight into the adaptation and evolution that species undergo, and thus advances scientific knowledge. However, most Hawaiian honeycreepers are either extinct or highly imperiled due to human activities, and to this day the surviving species face many ongoing threats to their existence. The Endangered Species Act protects over a dozen threatened and endangered honeycreeper species, as well as the knowledge they represent.

C. Esthetic, historical, and cultural importance.

Congress also recognized aesthetic and cultural values of ecosystems and species. Aesthetic arguments for preserving species revolve around values humans place on quality of life, and range from considerations such as enhanced property values, amenity benefits, and recreational opportunities in areas of greater species diversity to perceptions of beauty and tranquility. *See* Freeman & Herron, *supra*, at 742; *The Future of Life*, *supra*, at 187. The aesthetic value of species is also reflected in our art and photography, in our longing to keep pets and to cultivate gardens, and even in the growing ecotourism trade. Gretchen C. Daily and Paul R. Ehrlich, *Population Extinction and the Biodiversity Crisis, in Biodiversity Conservation: Problems and Policies* 47, C.A. Perrings et al., eds. (1995).

Culturally, species play a prominent role in the identity of indigenous peoples and contemporary nations, as well as an important role in the religious lives of many.

See Freeman and Herron et al., *supra*, at 743. The Jewish and Christian traditions hold that people have a stewardship duty to preserve biodiversity; Hinduism locates divinity in certain animals, and Buddhism and Jainism avoid unnecessary harm to life. Primack, *supra,* at 133. In addition, many native religions and cultural traditions focus on the energies of various species. The government of Papua New Guinea, for example, protects various species of birds-of-paradise (family Paradisaeidae) as a critical cultural resource. Freeman and Herron et al., *supra*, at 743.

In the United States, many species have important cultural value. Bald eagles are a prominent example. The national symbol of our country and an important species to many Indian tribes, bald eagles are still protected under the Endangered Species Act. At the time Congress enacted the ESA, the birds were virtually extirpated from the contiguous United States. Fortunately, bald eagles today serve as a success story of the ESA; without broad application of the statute, this country might today enjoy its national symbol only on posters and placards rather than soaring overhead.

A final literary example also serves to illustrate lawmakers' wisdom in enacting strong legal protections for biodiversity. Known to science as the California red-legged frog (Rana aurora draytonii), this species has been extirpated from 70 percent of its former range. Found today primarily in isolated wetlands and streams in coastal drainages of central California, California red-legged frogs were listed as threatened under the Endangered Species Act in 1996. 61 Fed. Reg. 96583 (1996). Most people know little of the biology or legal status of this species; it is instead immediately recognizable to most Americans as a cultural icon – the Celebrated Jumping Frogs of Calaveras

County. Mark Twain wrote of this venerated frog: "You never see a frog so modest and straightforward as he was, for all he was so gifted. And when it come to fair and square jumping on a dead level, he could get over more ground at one straddle than any animal of his breed you ever see . . . Smiley would ante up money on him as long as he had a red. Smiley was monstrous proud of his frog, and well he might be, for fellers that had traveled and been everywheres, all said he laid over any frog that ever they see." Mark Twain, *The Celebrated Jumping Frog of Calaveras County and Other Sketches* (1867). Thanks to the ESA, red-legged frogs are still in existence to jump long distances, preserving not only their genetic resources and their ecological and scientific value, but also maintaining a unique and important part of the cultural history of this country.

II. REGULATION OF ALL FEDERAL AGENCY ACTIONS UNDER SECTION 7 IS AN IMPORTANT ASPECT OF THE ENDANGERED SPECIES ACT'S PROTECTIONS FOR LISTED SPECIES.

A. The Endangered Species Act has proven effective in halting and reversing species decline in the United States.

The United States harbors an extraordinarily rich array of biological diversity. Though representing only 6% of the Earth's land area, this county contains portions of 12 of the world's 14 major ecosystem groups, known as biomes; by this measure the United States is the most ecologically diverse nation on the planet. M. Breyer et al., *More than the Sum of the Parts, in Precious Heritage* at 206, B. Stein et al., eds. (2000). Science has formally

described slightly more than 200,000 different species that live within the U.S., though the actual total most likely lies between 300,000 and 600,000 unique life forms present within this country. B. Stein, *A Remarkable Array: Species Diversity in the United States*, *in Precious Heritage, supra,* at 61. Many of these species exist nowhere else in the world; for example, more than a quarter of the country's vascular plants – including over 1,000 in Hawaii alone – are endemic to the United States. *Id.* at 69. Given that the dispute in the instant case arises under the Clean Water Act, it is particularly significant to note the global importance of this country's aquatic species. The approximately 800 species of freshwater fishes found in the U.S. comprise about 10% of the known freshwater fish species worldwide. The United States is also the most species-rich nation on Earth for other freshwater organisms, including freshwater mussels, snails, turtles, crayfish, and salamanders. *Id.* at 67.

Unfortunately, the United States' vast array of life presently faces severe threats, mostly as a result of human activities. More than 500 native species present at the time European settlers first came to this country are either extinct or no longer present in the United States. L. Master et al., *Vanishing Assets: Conservation Status of U.S. Species*, *in Precious Heritage, supra,* at 114. Some of these losses are well known, such as passenger pigeons, whose population plummeted from hundreds of millions to extinction over barely a century as a result of overexploitation by hunters coupled with loss of habitat. Other extinctions, including those of many bird species in Hawaii, took place out of the public eye with little fanfare. Presently, a growing percentage of the nation's plants and animals face an uncertain future; at least one-third of the

nation's known species are considered by scientists to be of conservation concern. *Id.* at 101. On a percentage basis, aquatic species top the list of the country's most imperiled organisms, disappearing at a rate of between two and five times that of terrestrial species. L. Helfrich et al., *Sustaining America's Aquatic Biodiversity: Why is Aquatic Biodiversity Declining?*, Virginia Tech Pub. No. 420-521 (2003). Nearly three quarters of freshwater mussel species in the United States face substantial risks to their continued existence, followed by crayfishes (over half of all U.S. species at risk), freshwater fishes (over one-third of all U.S. species at risk), and amphibians (also over one-third of all U.S. species at risk). L. Master et al., *supra*, at 102.[4]

The United States currently lacks any comprehensive national strategy to manage and safeguard its biological resources. A wide variety of federal laws, programs, and tax policies require or encourage conservation of species and habitats, supplementing a similar array of such mechanisms at the state and local level. However, these initiatives vary greatly in their coverage and effectiveness. For example, a decade ago Congress enacted organic legislation for the nation's collection of federal wildlife refuges, calling on the U.S. Fish and Wildlife Service (FWS) to plan and direct the growth of the refuge system

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[4] Indeed, in its opinion in TVA v. Hill, 437 U.S. 153, 178 (1978), this Court singled out a statement by the Assistant Secretary of Interior who, in explaining to Congress the need for legislation to protect imperiled species, pointed in particular to vanishing mollusks in the Southeastern United States. Though admitting to uncertainty about the importance of such species, the Assistant Secretary noted that he had "great trouble being party to their destruction without ever having gained such knowledge." Id.

to "contribute to the conservation of the ecosystems of the United States." 16 U.S.C. §668dd(a)(4)(C). However, the federal Wildlife Refuge System, as a result of historical acquisition and designation priorities that often favored waterfowl and game species, currently harbors less than 10% of total number of species formally listed as threatened or endangered in the United States. C. Groves et al., *Owning Up To Our Responsibilities: Who owns Lands Important to Biodiversity?*, *in Precious Heritage, supra,* at 283.

In the absence of an overall federal approach to managing biodiversity, the federal Endangered Species Act (ESA) has assumed an increasingly prominent role in efforts to conserve species and their habitat in the United States. The statute's ever-increasing importance to the nation's biodiversity conservation efforts also stems from the growing number of species facing the possibility of extinction; the statute currently protects over 1,000 species found within the United States as endangered, as well as more than 300 species listed as threatened. U.S. Fish and Wildlife Service, http://ecos.fws.gov/tess_public/Boxscore.do (visited March 14, 2007).[5] Reflecting biological trends, aquatic species make up nearly one-fifth of those listed on the threatened and endangered rolls. *See id.*

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[5] Significantly, however, the ESA's lists of threatened and endangered species likely significantly understate the number of life forms in the United States facing extinction. The actual number of species deserving of legal protections may be ten times the number species currently listed. See D. Wilcove et al., *How Many Endangered Species Are There in the United States?*, 3 Frontiers in Ecology and the Environment 414 (2005).

Recent studies indicate that when species are designated for protection under the ESA, the statute has been effective at halting and reversing their slide toward extinction. Using data on species status reported over a 14-year period by the U.S. Fish and Wildlife Service, an interdisciplinary research team found a strong correlation between listing under the ESA and the likelihood that a species' conservation status was improving. M. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BioScience 360 (2005). Based on findings that species listed for a longer period of time were more likely to be classified by FWS as improving in status and less likely to be declining, these researchers also concluded that protection under the ESA provides listed species with conservation benefits that accumulate over time, particularly in the initial years after a species was placed on the endangered and threatened lists.

The significant positive link between the time a species is protected by the ESA and the likelihood that its conservation status is stable or improving was confirmed by a second investigation, which also used data reported by FWS. Among species whose conservation status was known by FWS, researchers found only 23% of species listed for less than two years were classified as improving, whereas 68% of species that had been protected by the ESA for 13 years or more were improving. T. Male and M. Bean, *Measuring Progress in US Endangered Species Conservation*, 8 Ecology Letters 986 (2005). Perhaps not surprisingly, this study also noted a strong positive link between government expenditures on recovery measures and the likelihood that a species' status was improving. Sounding an alarming note for some aquatic species in particular, the research team noted that freshwater

mussels had the worst status trend among species they examined, though many of these species were extremely imperiled when they were added to the protected lists and more than half of these species had been listed for less than 12 years.

Recognizing the Endangered Species Act's important role in providing "emergency room" protections for species whose declines have put them at risk of extinction, as well as the law's increasing prominence in influencing biodiversity conservation efforts generally, scientists and scientific organizations have consistently voiced strong support for maintaining and effectively implementing the statute. For example, in February 2006 joint statement opposing efforts to modify the Endangered Species Act's scientific standards, the American Fisheries Society, Ecological Society of America, Entomological Society of America, Society for Conservation Biology-North America, Society for Range Management, and The Wildlife Society – professional organizations which collectively represent thousands of scientists – declared that "[t]he ESA is a vital and fundamentally sound tool in this Nation's efforts to maintain biological diversity." Scientific Societies' Statement on the Endangered Species Act, February 27, 2006 (available at http://www.conbio.org/Sections/NAmerica/NAPolicy.CFM#NA20060227).

B. The procedural and substantive provisions of section 7(a)(2)'s consultation process provide crucial legal protections for a substantial number of listed species and their habitat.

As this Court has consistently recognized, the substantive and procedural requirements set forth in section

7(a)(2) of the Endangered Species Act, 16 U.S.C. §1532(a)(2), are among the most important and influential of the statute's protections for listed species. *See, e.g., TVA v. Hill*, 437 U.S. 153, 173 (1978); *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Because the requirements of section 7(a)(2) apply to the actions of federal agencies, these legal provisions play an especially crucial role in conserving listed species that occur on federal land. The federal government owns approximately 400 million acres of land in the United States outside Alaska. While most of these land holdings are concentrated in the western states, federal lands within other states also contain areas with substantial biological value. Federal lands in Florida's Everglades and on barrier islands along the Gulf of Mexico coast provide examples of public land holdings that, while not large in absolute terms, play an outsized role in terms of biodiversity conservation. Together, federal lands support populations of nearly three-fifths (59%) of the species protected under the ESA. Groves, *supra,* at 278-79. This means that section 7's prohibitions against actions that jeopardize listed species or destroy or adversely modify critical habitat – which apply to all decisions by federal land managers – directly and substantially influence what happens to populations of, and habitat for, the majority of threatened and endangered species in the United States.

Though the requirements of section 7 of the ESA apply exclusively to the actions of federal agencies, this section of the statute nonetheless also provides significant protections for threatened and endangered species and their habitat on non-federal land. Regulations implementing section 7 define agency "action" to include "all activities or programs of any kind authorized, funded, or carried

out, in whole or part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. §402.02. Many activities that affect listed species on non-federal land require a federal permit or depend to some degree on federal funding. Wetlands, for example, provide habitat for many threatened and endangered species. Before significantly altering most wetland areas, a landowner must first obtain a permit from the U.S. Army Corps of Engineers pursuant to section 404 of the Clean Water Act, 26 U.S.C. §1344(a); if the action may affect listed species or destroy or adversely modify designated critical habitat, the Corps must comply with the requirements of section 7. Other actions by federal agencies that affect threatened and endangered species on non-federal land, such as funding for road and highway construction, registration of pesticides, granting hydropower licenses, and even providing federal flood insurance, must comply with the procedural and substantive mandates of section 7 before the relevant federal agency may finalize its action.

The number of section 7 consultations between the ESA's designated "expert" agencies – FWS and the National Marine Fisheries Service (NMFS) – and other federal agencies whose actions may affect listed species or critical habitat provide a good gauge of the importance of section 7's protections for threatened and endangered species. FWS alone conducted over 300,000 formal and informal section 7 consultations[6] with other federal

[6] Regulations implementing section 7 provide for an exception to the ESA's statutory or "formal" process for consultation if a federal agency proposing an action determines, with written concurrence from FWS or NMFS, that its proposed action is not likely to adversely affect any listed species or critical habitat. See 50 C.F.R. §402.14(b).

agencies during the years from 1998-2002. FWS, Consultations With Federal Agencies, www.fws.gov/endangered/consultations/consultations.pdf (visited March 14, 2007). Since the consultation requirement is not triggered unless a proposed federal action "may affect" listed species or designated critical habitat, *see* 50 C.F.R. §402.14(a), the large number of section 7 consultations that take place each year indicate the correspondingly vast number of federal actions that may affect conservation of threatened and endangered species and their habitat. Moreover, all of these consultations involve careful analysis of the impact a proposed action is likely to have on listed species, and many result in modifications to original proposals by federal agencies in order to avoid or minimize adverse impacts on these species and their habitat.[7] Cumulatively, therefore, the requirements of section 7 result in a huge amount of analytical work on the impacts of a wide array of activities on listed species, and they lead to many actions that help prevent or at least slow erosion of the nation's biological resources.

Finally, from a scientific perspective, section 7 is particularly crucial to species conservation efforts because unlike the ESA's prohibition against actions that "take" protected species, the section 7 process embodies a more

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[7] Federal agencies often modify their actions in order to reach a finding that an action is not likely to adversely affect listed species or critical habitat, thus allowing them to avoid section 7's formal consultation process. See 50 C.F.R. §402.14(b). Moreover, biological opinions that result from the "formal" consultation often contain "incidental take statements" that must set forth "reasonable and prudent measures" (and associated "terms and conditions") designed to minimize the impact of incidental take, i.e., unintended death or injury, to listed species. 16 U.S.C. §1536(b)(4)(C)(iii) and §1536(b)(4)(C)(iv).

precautionary approach to protecting biodiversity. Section 9 of the ESA, 16 U.S.C. §1538(a)(1)(B), forbids the "take" of endangered species of fish and wildlife (and, under applicable regulations, most threatened species), defined to include such actions as killing or capturing individual members of a species; it also bans activities that "harm" protected species, including actions that actually kill or injure listed species by significantly modifying or degrading habitat. *Id.*; 50 C.F.R. §17.21; §17.31; and §222.102. *See generally, Sweet Home Chapter, Communities for a Great Oregon v. Babbitt*, 515 U.S. 687 (1995).[8] While these prohibitions allow prosecutors to seek civil and criminal penalties against those who have unlawfully taken protected species, they focus on after-the-fact penalties rather than preventative conservation measures. It is possible for federal agencies or interested third parties employing the ESA's citizen suit provision to enjoin actions likely to result in unlawful take of species in the future, but they face a potentially steep burden of proof. For example, in *National Wildlife Federation v. Burlington Northern Railroad Inc.*, 23 F.3d 1508 (9th Cir. 1994), the court rejected arguments that a grain spill near railroad tracks would continue to result in deaths to grizzly bears despite the fact that accidents had previously occurred at the site. The court asserted that showing a violation of section 9 requires "a definitive threat of future harm to protected species, not mere speculation." *Id.* at 1512, n. 8.

The prohibitions Congress set forth in section 7 to protect listed species, on the other hand, emphasize *preventing* adverse impacts to biodiversity. Lawmakers in

[8] Endangered and threatened plants receive somewhat lesser protections under section 9; see 16 U.S.C. §1538(b).

1973 characterized the ESA as the "institutionalization of . . . caution." *TVA v. Hill*, 437 U.S. at 178 (1978) (quoting H.R. Rep. No. 93-412, pp. 4-5 (1973)). Section 7 takes a precautionary approach to management of listed species and their habitat by directing that federal agencies "insure" that their actions are not likely to jeopardize these species or destroy or adversely affect critical habitat. 16 U.S.C. §1536(a)(2). Uncertainty is a constant in science, and there is a great deal we do not know about the biological world around us, particularly involving imperiled species. Section 7's requirement that agencies analyze their actions in advance, as well as its mandate that federal actors insure against significant harm to protected species and their critical habitat, thus stands as one of the most important provisions of federal law dealing with biodiversity conservation.

C. Section 7's emphasis on science favors interpreting its prohibitions to apply to all federal actions that are not granted an exemption by the Endangered Species Committee.

Upon reading the entirety of section 7 of the Endangered Species Act, one is left with the unmistakable impression that Congress based its plainly-worded provisions on a foundation of science. Decades ago, the great naturalist Aldo Leopold observed that "[t]o keep every cog and wheel is the first precaution of intelligent tinkering." A. Leopold, *A Sand County Almanac* at 177 (1949). Lawmakers heeded this sound advice in enacting the Endangered Species Act, specifically noting that a cautious approach to management of the nation's biological resources was "at the heart" of the law. H.R. Rep. No. 93-412, pp. 4-5

(1973). Section 7 in particular reflects this precautionary, science-based approach to preventing extinctions. Several factors demonstrate lawmakers' unmistakable intent to apply the substantive prohibitions of section 7(a)(2) to all federal agency actions, save those expressly granted an exemption: the plain language of this section of the statute, coupled with its emphasis on science; the exacting scientific procedures set forth throughout the complimentary provisions of section 7; and the inclusion of a detailed exemption process that expressly allows only a high-level policy body, after exacting consideration of both biological and non-biological factors, to elevate non-scientific considerations over the biological needs of a listed species in specific instances.

Section 7(a)(2) employs the terminology and clear language that science often uses to denote a high degree of certainty. It directs federal agencies to employ the "best scientific and commercial data available" in carrying out their responsibilities to avoid taking actions likely to jeopardize listed species or destroy their critical habitat. 16 U.S.C. §1536(a)(2). It also frames this mandate expansively, providing that these prohibitions apply to "*any* action authorized, funded, or carried out" by a federal agency. *Id.* (emphasis added). Moreover, as noted above, Congress directed agencies to "insure" that their actions are "not likely to" lead to the prohibited results. *Id.* Lawmakers added the phrase "not likely to" to section 7 in 1979, but nonetheless explained that they still meant for agencies to give listed species "the benefit of the doubt." H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12, reprinted in 1979 U.S. Code Cong. & Admin. News 2572, 2576. Together, these elements of the law's plain wording indicate that Congress sought to enact into federal law

Aldo Leopold's wise, science-based counsel: Guided by the best science, do not allow *any* actions that threaten the existence of imperiled species or the habitat that sustains them.

Other provisions of section 7 that support its basic substantive mandates to avoid federal actions that jeopardize listed species or destroy critical habitat also reflect a comprehensive, science-based approach to protecting biodiversity. Prior to undertaking an action where listed species may be present, a federal agency must perform a biological assessment to identify species likely to be affected by its action and determine the extent of those effects. *See* 16 U.S.C. §1536(c)(1); 50 C.F.R. §402.12(a). Agencies may not take steps toward completing a proposed action that would foreclose options which would avoid conflicts with conservation of listed species. *See id.* at §1536(d). Moreover, the dominant procedural mechanism of section 7 – consultation between agencies with expertise in biodiversity conservation and those whose actions may affect listed species and their habitat – reflects standard practices in science, namely sharing of expertise and peer review. Together, these procedural elements of section 7 also demonstrate Congress' deliberate construction of an analytical, cautious approach to proceeding with federal actions that may affect threatened and endangered species and their habitat. A reading of section 7 that exempts whole categories of federal actions from the requirements of section 7 would be inconsistent with this systematic and scientific process.

Finally, prompted by this Court's decision in *TVA v. Hill*, *supra*, Congress added to section 7 a distinct and detailed process that allows a high-level policymaking body to grant exemptions from the section's otherwise

science-based mandates. *See generally* 16 U.S.C. §1536(e) through §1536(p). This separate exemption process emphasizes the distinction between the comprehensive, science-based requirements discussed above and the specific circumstances under which designated officials may consider non-scientific factors in deciding whether a federal action may proceed notwithstanding its impacts on protected species. Perhaps more significantly, it also emphasizes lawmakers' view of the gravity of a decision to allow a federal action to proceed in the face of information indicating that it would jeopardize a listed species or destroy critical habitat. Only a Cabinet-level committee – or the President within declared disaster areas – may grant exemptions to the substantive mandates of section 7. *See id.* at §1536(e); §1536(p). Moreover, the Endangered Species Committee may grant exemptions only after a series of exacting procedures, including public notice and a formal adjudicatory hearing. *See id.* at §1536(g)(2)(B)(ii); §1536(g)(4). Additionally, no exemption may be granted in the absence of a biological assessment of the proposed action's effects on listed species. *See id.* at §1536(g)(3)(A)(ii). This indicates that lawmakers were unwilling to allow even individual federal actions to be exempted from section 7 without first requiring scientific scrutiny of their impacts on listed species.

Section 7's exacting exemption process stands in stark contrast to an interpretation of section 7 that would make the substantive protections of this section inapplicable to an indeterminate and potentially broad array of federal agency actions. Rather than being carefully weighed by high-ranking public officials, adoption of the position advanced by Petitioners could permit decisions exempting various federal agency actions from section 7 to be made routinely by agency administrators and government

counsel. Moreover, these exemptions from the requirements of section 7 would necessitate no public notice and, perhaps of more concern, would not require federal agencies to consider or even identify projects' impacts on threatened and endangered species. These outcomes are not consistent with the painstaking and narrow exemption process that Congress added to section 7 in 1978 in order to allow for careful consideration of exceptions to this section's key prohibitions. The exacting exemption process in the statute accounts for the importance and potential finality of a decision that can place the future of an imperiled species in doubt or even consign it to extinction. It is, therefore, virtually inconceivable that lawmakers simultaneously intended to allow a host of so-called "nondiscretionary" federal agency actions – which could lead to similarly disastrous biological results – to proceed unregulated by the ESA.

III. CONCLUSION.

For the foregoing reasons, *Amici* respectfully request that this Court affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FEDERAL WATER QUALITY COALITION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Federal Water Quality Coalition (the "Coalition") is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made under the federal Clean Water Act (33 U.S.C. § 1251, *et seq.*) (the "CWA").[2] Coalition member entities or their members own and operate facilities located on or near waters of the United States. These entities operate pursuant to individual or general National Pollution Discharge Elimination System ("NPDES") wastewater or stormwater permits, which were issued by EPA or, if EPA has transferred permitting authority pursuant to section 402(b) of the CWA, 33 U.S.C. § 1342(b) ("CWA § 402(b)"), by state water quality agencies. The Coalition previously filed a brief in support of the petitions for writs of *certiorari* in this case.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the Coalition states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the Coalition, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

[2] Consent by all of the parties in this case has been given to the Coalition for filing this brief. Petitioners National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association; Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller; and the State of Arizona have submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The United States Environmental Protection Agency ("EPA") has provided specific written consent to the Coalition to file this brief. The Coalition submits EPA's consent letter to the Court concurrent with its filing of this brief.

The Ninth Circuit decision below interpreted section 7(a)(2) of the federal Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA § 7(a)(2)"), as imposing an additional requirement on CWA § 402(b) transfer decisions that is not contained in the CWA. This new requirement, if left to stand, would directly and adversely affect the administration of the NPDES permitting program as it is applied to Coalition members. In light of the substantial impact this case will have on its members, the Coalition has a direct interest in maintaining the current, well-established NPDES program, which will be undermined if the Ninth Circuit decision is not reversed.

SUMMARY OF ARGUMENT

The Ninth Circuit decision allows ESA § 7(a)(2) to override EPA's mandatory duty to transfer NPDES permitting authority to the states under CWA § 402(b), in direct conflict with the language and Congressional intent of the CWA. CWA § 402(b) states that EPA is required to transfer NPDES permitting authority to a state if that state can demonstrate that its program will meet the nine criteria contained in CWA § 402(b)(1)-(9). There is no dispute that the State of Arizona met the nine required criteria under CWA § 402(b). *Defenders of Wildlife v. EPA*, 420 F.3d 946, 963, n. 11 (9th Cir. 2005). The Ninth Circuit, however, ruled that pursuant to ESA § 7(a)(2), EPA must also insure that any action to transfer NPDES permitting authority to a state under CWA § 402(b) is not likely to jeopardize the continued existence of any endangered species. *Id.* at 967. In vacating EPA's transfer approval, the Ninth Circuit held that EPA failed to comply with ESA § 7(a)(2) in transferring NPDES permitting authority to the State of Arizona, as evidenced, according to the court, by the mere fact that Arizona, as a state agency, is

not required to comply with the consultation requirement of ESA § 7(a)(2). *Id.* at 971.[3]

The Ninth Circuit decision cannot stand because it writes a superseding requirement into CWA § 402(b), contrary to EPA's obligations under the plain language of that statute. As a result, the Ninth Circuit decision could have a broad and unjustified effect on EPA, state agencies, and the entities they regulate, including Coalition members, without any indication from Congress that such an effect was intended, or is warranted. The Congressional intent behind the NPDES program, as well as the CWA generally, is to allow the states to take a primary role in the regulation of pollutant discharges to their waters. 33 U.S.C. § 1251(b). The Ninth Circuit's disregard of that intent undermines the well-established system that has resulted in the mandatory EPA transfer of NPDES permitting authority to 45 states over the last 33 years.[4]

According to the Ninth Circuit, in order to maintain their NPDES permitting authority, states must strictly comply with ESA § 7(a)(2) to insure that state actions are not likely to jeopardize endangered species. Accordingly, for current state programs to avoid a withdrawal of NPDES authority, or for new state applicants to obtain a transfer of authority pursuant to CWA § 402(b), states would apparently be required to

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[3] The Ninth Circuit specifically held that "the EPA's transfer decision will cause whatever harm may flow from the loss of *section 7* consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer." *Defenders of Wildlife*, 420 F.3d at 971 (emphasis in original).

[4] The first state that EPA transferred NPDES permitting authority to was California on May 14, 1973. *See* National Pollution Discharge Elimination System (NPDES): Specific State Program Status (last visited February 16, 2007) <http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific>.

adopt burdensome mechanisms to implement the requirements of ESA § 7(a)(2), despite that section's facial applicability only to federal agencies. The Ninth Circuit decision could require EPA to revisit its CWA § 402(b) transfer decisions, and withdraw approval of state NPDES programs, regardless of independent state efforts to protect endangered species, if full state compliance with the requirements of ESA § 7(a)(2) cannot be demonstrated. 33 U.S.C. § 1342(c). Broad withdrawal of state NPDES authority would have serious practical implications for federal and state agencies and the regulated community. For example, EPA would be burdened by the return of permitting authority and would have its resources exhausted by the increased volume of new permitting decisions, potentially leading to burdensome delays for regulated facilities seeking permits.

The Ninth Circuit decision would also unreasonably override the authority of EPA, as well as all other federal agencies, to satisfy their numerous mandatory obligations outside of CWA § 402(b). Because there is no indication that the Ninth Circuit limited its interpretation of ESA § 7(a)(2) to the NPDES delegation context only, EPA would apparently be required, by the logic of the decision, to consult with the Fish and Wildlife Service or the National Marine Fisheries Service (collectively, the "ESA Services") before performing numerous other mandatory duties under the CWA and other environmental statutes. Moreover, all other federal agencies would also be required to consult with the ESA Services before acting under non-environmental statutes, as recognized by the dissenting opinion on the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit: "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394,

399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). The extensive effects of the Ninth Circuit decision cannot be overstated.

If broadly applied, the Ninth Circuit decision would cause substantial and unwarranted changes in the administration of the NPDES program, contrary to the language of the CWA itself, as well as its underlying Congressional intent. The Ninth Circuit decision should be reversed.[5]

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[5] In granting the petitions for writs of *certiorari*, the Court requested that the parties brief and argue an additional set of issues: whether the Ninth Circuit correctly found that EPA's transfer decision was arbitrary and capricious, and if so, whether the Ninth Circuit should have remanded on that basis without interpreting ESA § 7(a)(2). The Coalition believes that the Ninth Circuit decision was in error in finding that EPA's transfer decision was arbitrary and capricious. However, the Coalition does not think that the Court should decide this case on that basis. Instead, the Coalition believes that the issue of the Ninth Circuit's interpretation of ESA § 7(a)(2) is ripe for the Court's review and should be decided at this time. If a remand to EPA is ordered, EPA would again transfer NPDES permitting authority to the state of Arizona, as EPA and the ESA Services both agree that ESA § 7(a)(2) cannot overrride EPA's nondiscretionary duties under CWA § 402(b). *See* EPA App. to Pet. for Writ of Cert., at 93a-116a. Assuming Respondents again seek review of EPA's transfer decision based on an alleged failure to comply with ESA § 7(a)(2), the Ninth Circuit would likely interpret the parameters of ESA § 7(a)(2) consistent with its previous decision below. Again assuming that the non-prevailing parties pursue a petition for writ of *certiorari* to the Court after the Ninth Circuit's second interpretation of ESA § 7(a)(2), the Court would be faced with the same statutory interpretation issue before it now.

Instead of remanding the case, which would most likely return to the Court at a later time for an interpretation of ESA § 7(a)(2) in relation to CWA § 402(b), the Court should review that issue at this time. If the case were remanded, it would take some time – months

(Cont'd)

ARGUMENT

I. THE NINTH CIRCUIT'S INTERPRETATION OF ESA § 7(a)(2) SUBSTANTIALLY AND ADVERSELY UNDERMINES THE WELL-ESTABLISHED NPDES PROGRAM IN DIRECT CONFLICT WITH THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF THE CWA.

1. The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA prohibits any person from discharging any pollutant into the waters of the United States from a point source unless the discharge complies with the CWA's statutory requirements. 33 U.S.C. § 1311(a). Section 402 of the CWA ("CWA § 402") authorizes EPA to issue NPDES permits for the discharge of pollutants, provided the discharge meets particular statutory requirements. 33 U.S.C. § 1342(a). As described by the Court, "[g]enerally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Florida Water*

(Cont'd)

if not years – to return to this Court. During that time period, federal and state agencies and the regulated community would be left in a state of confusion as to whether ESA § 7(a)(2) applies to the NPDES program – and all other EPA-administered programs – as stated by the Ninth Circuit in *Defenders*, or whether it applies as stated by the Fifth and D.C. Circuits in *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) and *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992). Such confusion will lead to uncertainty and inconsistency in administering water programs under the CWA and other acts administered by EPA (in addition to other Federal programs administered by other agencies). Therefore, the Court should address the ESA § 7(a)(2) interpretation issue now.

Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004).

The CWA also recognizes "that the States should have a significant role in protecting their own natural resources." *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a) ("The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'")). To this end, CWA § 402(b) mandates that EPA transfer to states the authority to implement and administer the NPDES permit program, if a state can meet the nine requirements in sections 402(b)(1)-(9) of the CWA. 33 U.S.C. § 1342(b) ("The Administrator **shall approve** each such submitted program unless he determines that adequate authority does not exist . . . .") (emphasis added). If a state seeks a transfer of NPDES permitting authority from EPA, the governor of such a state "may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. § 1342(b). Once a state elects to implement its own program, and EPA approves such "submitted program" under the criteria of CWA § 402(b), state programs can issue permits that insure compliance with the CWA. *Id.* Moreover, once a state permitting program is established, EPA will cease to administer the NPDES program in the state's jurisdiction and "shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless [EPA] determines that the State permit program does not meet the requirements of subsection (b) of this section . . ." 33 U.S.C. § 1342(c).

Once EPA transfers NPDES permitting authority to a state, the state program "shall at all times be in accordance

with" section CWA § 402. 33 U.S.C. § 1342(c)(2). Moreover, state programs are required to implement EPA's NPDES regulations. 40 C.F.R. § 123.25(a) ("All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each . . ."). EPA has a continuing duty to determine whether a state program is in compliance with CWA § 402. 33 U.S.C. § 1342(c)(3). If EPA determines that a state is not complying with CWA § 402 in administering its NPDES program, EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, . . . the Administrator **shall** withdraw approval of such program." *Id.* (emphasis added). The permitting authority for that state then reverts to EPA under CWA § 402(a). 33 U.S.C. § 1342(a).

Since 1972, when CWA § 402(b) was enacted, 45 states, including Arizona, have invoked that statute to require EPA to transfer NPDES permitting authority. *See* footnote 4, *supra*. In addition, the State of Alaska has indicated in an *amicus curiae* brief that it formally applied for a transfer on June 29, 2006 and is in the process of seeking approval from EPA as the 46th state to obtain NPDES permitting authority. In other words, for more than three decades, EPA and the states have jointly employed CWA § 402(b) to satisfy "the policy of Congress that the States . . . implement the permit programs under sections 402 and 404 of [the CWA]." 33 U.S.C. § 1251(b).

2. Despite the clear intent of the CWA, the Ninth Circuit decision subverts the system that has been implemented by EPA's repeated transfers of NPDES permitting authority to the states. Under CWA § 402(b), EPA has a nondiscretionary duty to transfer its NPDES permitting authority if a state is able to demonstrate that its permitting program complies with the nine requirements of CWA § 402(b)(1)-(9). 33 U.S.C. § 1342(b); *see also, American Forest and Paper Assoc. v.*

EPA, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of § 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements."). There is no indication in the plain language of CWA § 402(b), or the CWA generally, that EPA approval of a transfer is subject to any other requirements. In interpreting the two statutes at issue, CWA § 402(b) and ESA § 7(a)(2) should be interpreted to coexist peaceably. *See J. E. M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.* 534 U.S. 124, 143 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("Indeed, 'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"). To coexist with CWA § 402(b), ESA § 7(a)(2) cannot be read to expand EPA's power to deny a permitting authority transfer based on an assessment of the effect on endangered species, because that power is expressly limited to the nine criteria enumerated in CWA § 402(b)(1)-(9). Instead, ESA § 7(a)(2) should be read to require consultation regarding endangered species only where possible within the existing authority of EPA under the CWA. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) ("As the Commission explained, the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.") (emphasis in original); *American Forest and Paper Assoc.*, 137 F.3d at 299 ("We agree that the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction.") (emphasis in original). This is the only sensible interpretation of the two statutory provisions, because any other reading would prevent EPA from carrying out its nondiscretionary duties consistent with the plain language of the CWA, which EPA is required to do unless expressly provided otherwise by the CWA. *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly

provided in this Act, the Administrator of the Environmental Protection Agency . . . shall administer this Act."). As the Fifth Circuit aptly observed:

> There is no hint that Congress intended to grant EPA authority to erect additional hurdles to the permitting process beyond those expressly noted in § 402(b) . . . . The statute's plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command 'shall approve,' [the CWA] cannot be construed to allow EPA to expand the list of permitting requirements.

American Forest and Paper Assoc., 137 F.3d at 298. The Ninth Circuit decision should not stand, because it does not allow EPA to satisfy its mandatory duties under the plain terms of the CWA.[6]

3. There is no indication in the legislative structure or history of the CWA that Congress intended for ESA § 7(a)(2) to override EPA's nondiscretionary duties under CWA § 402(b). Under the CWA, EPA is required to withdraw NPDES permitting authority from a state if that state is not in compliance with CWA § 402(b)(1)-(9). 33 U.S.C. § 1342(c)(3). The Ninth Circuit decision, however, imposes

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[6] Even if the Court finds that the language of CWA § 402(b) and ESA § 7(a)(2) conflict, the mandatory language of CWA § 402(b) controls, because it more specifically describes EPA's obligations to transfer NPDES permitting authority to the states, and therefore prevails over the more general obligations set forth in ESA § 7(a)(2). *National Cable & Telecommunications Assoc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("It is true that specific statutory language should control more general language when there is a conflict between the two."); *Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

the additional requirement that a state would have to comply with ESA § 7(a)(2), otherwise NPDES authority could not be delegated to the state. *Defenders of Wildlife*, 420 F.3d at 971. As a result of the Ninth Circuit's interpretation of the CWA and ESA, EPA could be required to withdraw approval of state programs that are not in compliance with the requirements of ESA § 7(a)(2) (even though those requirements apply only to federal agencies), because EPA is required to withdraw its approval of noncompliant state programs pursuant to CWA § 402(c)(3). *See* 33 U.S.C. § 1342(c)(3) (In order to approve withdrawal of a noncompliant state program, EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . the Administrator shall withdraw approval of such program.") Thus, under the Ninth Circuit decision, if EPA does not insure ongoing state consultation with the ESA Services, EPA could be violating the ESA if it delegates NPDES authority to or fails to withdraw such authority from the state.[7]

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[7] The Coalition does not concede that EPA's determination of whether to withdraw permitting authority under CWA § 402(c) is an "action" for purposes of ESA § 7(a)(2). However, as explained in section II, *infra*, claims are being made that EPA's determination of whether to withdraw permitting authority is an action that requires ESA § 7(a)(2) consultation. *See, e.g.*, *Oregon Natural Resources Council v. Hallock*, No. 02-1650-CO, 2006 U.S. Dist. LEXIS 87070, *1-2 (D. Or. Nov. 29, 2006); National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act — Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 29 (Apr. 19, 2006), <http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/Nofl001.pdf>. If claims such as these succeed and a court decides that EPA's withdrawal determination under CWA § 402(c) is a federal action for purposes of ESA § 7(a)(2), then the logic of the Ninth Circuit decision seems to indicate that EPA would be required to withdraw NPDES permitting authority from state-administered programs based on noncompliance with ESA § 7(a)(2).

Such an interpretation of ESA § 7(a)(2) is inconsistent with the CWA's "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . ." such that "[i]t is the policy of Congress that the States . . . implement the permit programs under sections 402 and 404 of this Act." 33 U.S.C. § 1251(b); *see also Ouellette*, 479 U.S. at 489 (The states have a "strong voice in regulating their own pollution," and should play a major role in protecting and preserving their own natural resources.); Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174-75 (1995) (citing the CWA as an example of "cooperative federalism," whereby the states have been granted the primary responsibility of administering and enforcing the permit program in a way that fits their objectives). The legislative history of the CWA confirms Congress' expectation that the states would be the primary administrators of the NPDES permitting program. S. COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. Rep. No. 92-414, at 71 (1971) ("It is expected that the States will play a major role in the administration of this program."). Congress accurately recognized that states possess the expertise to administer their own permit systems. *Id.* at 8 ("Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries."). During hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, EPA Assistant Administrator John R. Quarles, Jr. stated:

> We are proceeding with the program that is based on trying to relate it to the existing structure of the Federal-State partnership established under the [CWA] and that structure places in the States the primary firing line responsibility for dealing with polluters, gathering information as to water quality

> conditions in the State, and prescribing levels of treatment that should be required. The Federal role is a backup role and we are trying to be more vigorous in pursuing our own responsibilities but not distort them into a fundamentally different level of responsibility.

Bills Amending the Federal Water Pollution Control Act and other Pending Legislation Relating to Water Pollution Control, Hearings before the S. Subcomm. on Air and Water Pollution of the Comm. on Public Works, 92nd Cong. 4356 (1971). The conflict between the express policy and the Congressional intent of the CWA, and the Ninth Circuit decision demonstrates the unwarranted impact that the decision could have on the administration of the NPDES program and the CWA.[8]

4. If the Ninth Circuit decision is left to stand, there will be significant practical impacts on the current NPDES program. For example, in order to avoid a denial of new applications for a transfer (such as for the currently pending application submitted by State of Alaska), or a possible withdrawal of EPA's approval of current NPDES programs, states could be required to develop permitting programs that implement the provisions of ESA § 7(a)(2), despite the fact that the plain language of ESA § 7(a)(2) applies only to federal agencies. 16 U.S.C. § 1536(a)(2); *see also*, John H. Minan, *General Industrial Storm Water Permits and the Construction Industry: What does the Clean Water Act Require?*, 9 CHAP. L. REV. 265, 288 (2006) (In light of Ninth

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[8] There is also no language in ESA § 7(a)(2) that would support the Ninth Circuit's imposition of that statute's requirements on the states. The unambiguous language of ESA § 7(a)(2) only applies to "[e]ach Federal agency," and not to a state or state agency. 16 U.S.C. § 1536(a)(2). As a result, the Ninth Circuit decision is inconsistent with the intent of ESA § 7(a)(2).

Circuit decision, "[t]o the extent that the EPA does not comply with the federal consultation provisions of the ESA in deciding to approve an NPDES permitting transfer to the state, such a transfer may be in legal jeopardy."). This required revision could have a sweeping effect on state NPDES programs, because states could be required to consult with the ESA Services on all actions under the NPDES program, including decisions on individual wastewater or stormwater permits. The imposition of a direct ESA § 7(a)(2) consultation requirement on the states would drastically hamper the states' ability to issue timely NPDES permits, because states would now be required to wait for assessments from the ESA Services, which would be burdened with handling consultation requests from 45 states, before issuing permits. Such delays will adversely affect the regulated community; increased delays will cause more uncertainty in planning to meet future discharge requirements, particularly if a renewed permit imposes more stringent discharge limits. Systematic delays in the NPDES system will substantially affect entities constructing new facilities or modifying existing facilities, because such facilities may not be able to begin discharging wastewater or stormwater (and as a result, in many cases, not be able to begin operations at all) until EPA or a delegated state agency issues a permit. Moreover, a lengthier development period for an NPDES permit will lead to increased transaction costs (such as for additional meetings with permitting agencies and possibly ESA Services, and additional data collection and assessments regarding endangered species) for obtaining a permit renewal.

In addition, as a result of the Ninth Circuit decision, EPA could now be required to determine whether state NPDES programs follow ESA § 7(a)(2), leading to EPA withdrawing its approval of the programs based on impacts to endangered species. Once EPA withdraws its approval of a state NPDES program under CWA § 402(c)(3), the permitting authority

for dischargers in that state would revert to EPA under CWA § 402(a). 33 U.S.C. § 1342(a). The withdrawal of approval for a state program and transfer of the NPDES permitting authority back to EPA would significantly affect the permitting process, because EPA would be required to shift its resources to handle a substantial increase in NPDES permitting applications and decisions currently handled primarily by the states. This result - centralizing permitting decisions with EPA - is exactly the result that Congress sought to avoid in passing CWA § 402(b), and EPA's resources could then be exhausted on permitting decisions, due to the comprehensive and time-consuming analysis that is required for NPDES permits. It is unlikely that EPA would be able to match the volume and timeliness of issuing NPDES permits that are now being issued by the 45 states, leading to longer administrative processes for issuing discharge permits and an increase in the backlog of outdated permits. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 192, n. 37 (2005) ("Threat of revocation, however, may be weakened by the EPA's lack of capacity to actually run permit programs in the states."). Further, EPA lacks the local expertise and knowledge of the state agencies regarding their own waterways and dischargers, and would therefore need to conduct additional analysis to gain such knowledge, further delaying the NPDES permitting process. The unjustified impact on EPA, state agencies, regulated entities and other stakeholders of transferring state NPDES programs back to EPA further demonstrates that the Ninth Circuit decision is inconsistent with the CWA.

II. ESA § 7(a)(2) DOES NOT OVERRIDE THE AUTHORITY OF FEDERAL AGENCIES TO PERFORM THEIR MANDATORY STATUTORY DUTIES.

1. Because the Ninth Circuit held that ESA § 7(a)(2) effectively overrides the mandatory duties of EPA, without a limitation that its decision applies only to CWA § 402(b), it appears that ESA § 7(a)(2) could override mandatory actions by any federal agency under other statutes. ESA § 7(a)(2) states that "[e]ach federal agency shall . . . insure" that its actions are not likely to jeopardize the continued existence of an endangered species "in consultation with and with the assistance of the" ESA Services. 16 U.S.C. § 1536(a)(2). As to CWA § 402(b), the Ninth Circuit decision would impose an ongoing ESA § 7(a)(2) consultation responsibility in addition to the nine elements of CWA § 402(b). The additional ESA § 7(a)(2) requirement, if enforced, will undermine state authority to administer the NPDES program. Indeed, there are already indications that the Ninth Circuit decision is eroding the NPDES permitting program as administered by the states; multiple challenges to NPDES decisions have been raised based on alleged noncompliance with ESA § 7(a)(2). *See Oregon Natural Resources Council v. Hallock*, No. 02-1650-CO, 2006 U.S. Dist. LEXIS 87070, *1-2 (D. Or. Nov. 29, 2006) ("Plaintiffs filed this citizen suit . . . alleging that defendants are violating the Endangered Species Act . . . by failing to initiate and complete formal consultation with the U.S. Fish and Wildlife Service (USFWS) in connection with the issuance of a National Pollutant Discharge Elimination System (NPDES) permit."); National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act – Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 29 (Apr. 19,

2006), <http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/Nofl001.pdf> ("Specifically, the lawsuit will allege that you and EPA have failed to initiate or complete formal consultation with NMFS regarding the effects of EPA's delegation of NPDES permit program authority to the State of Washington Department of Ecology and EPA's ongoing oversight, involvement, and funding of that program as required by the ESA.").

2. There is no indication that the Ninth Circuit decision will be limited to EPA's duties under CWA § 402(b) or the CWA generally. The opinion dissenting from the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit recognized the breadth of the decision below as potentially applying to ". . . *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). For example, under the federal Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. §§ 6901, *et seq.*), a state may seek "to administer and enforce a hazardous waste . . . program . . ." by submitting an application to EPA. 42 U.S.C. § 6926(b). EPA then decides whether the application satisfies three criteria. *Id.* If EPA approves a state application for administering a RCRA permitting program, then "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under" RCRA. 42 U.S.C. § 6926(d). Further, EPA has a continuing duty to determine whether a state is properly administering and enforcing a hazardous waste permitting program. 42 U.S.C. § 6926(e). If a state is not properly administering a program and corrective action is not taken, EPA "shall withdraw authorization of such program and establish a Federal program . . . ." *Id.* In light of the Ninth Circuit decision, EPA could be required to insure ongoing state consultation with the ESA Services under ESA § 7(a)(2) compliance before EPA can delegate RCRA

permitting authority to a state. As with NPDES authority under the CWA, a state could be required to demonstrate to EPA that its RCRA permitting programs comply with ESA § 7(a)(2) in order to maintain such a permitting program. Likewise, EPA could be required to withdraw its approval of a RCRA permitting program if a state does not implement procedures to demonstrate to EPA that it is in compliance with ESA § 7(a)(2). Currently, EPA has delegated RCRA permitting programs to 48 states, plus the District of Columbia, (*see* <http://www.epa.gov/epaoswer/hazwaste/state/stats/maps/keychrt.pdf>), all of which could revert to EPA if the Ninth Circuit decision is upheld.

Another example of a statute that could be affected by the Ninth Circuit's ruling is the federal Clean Air Act ("CAA") (42 U.S.C. §§ 7401, *et seq.*). Under the CAA, states were required to develop and submit to EPA a permit program within three years after the enactment of the CAA. 42 U.S.C. § 7661a(d)(1). If a state program was not approved within two years, EPA was required to administer a permitting program for that state. 42 U.S.C. § 7661a(d)(3). If a state has delegated permitting authority, EPA is then charged with a continuing duty to determine whether "a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of" the CAA. 42 U.S.C. § 7661a(i)(1) & (2). If EPA determines a state is not properly administering a permitting program, EPA is required to issue a notice to the state. 42 U.S.C. § 7661a(i)(1). If the state has not come into compliance with the CAA within 18 months after the notice is issued, EPA is required to impose sanctions. 42 U.S.C. § 7661a(i)(2) (". . . the Administrator shall apply the sanctions under section 7509(b)."). Under the Ninth Circuit decision, states could be subject to sanctions under the CAA for

noncompliance with ESA § 7(a)(2).[9] In addition, EPA is required to object to a proposed permit from a state "[i]f any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of [the CAA], including the requirements of an applicable implementation plan . . . ." 42 U.S.C. § 7661d(b)(1) ("the Administrator **shall** . . . object to its issuance.") (emphasis added). Under the Ninth Circuit rationale, EPA could be required to object to CAA permits that are not issued in compliance with the provisions of ESA § 7(a)(2).[10]

Another example of a statutory provision that may be overridden by the Ninth Circuit decision is the state plan provision of the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. § 667. Under that provision, a state that "desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement."

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[9] To date, 16 Clean Air Act programs have been fully approved by EPA, and the remaining 34 state programs have been approved on an interim basis. *See* <http://www.epa.gov/oar/oaqps/permits/approval.html>.

[10] As with the CWA, there is also evidence that ESA § 7(a)(2) is affecting the CAA permitting program. A challenge has been brought against a Prevention of Significant Deterioration ("PSD") permit based on alleged noncompliance with ESA § 7(a)(2). *See In re: Indeck-Elwood, L.L.C.*, PSD Appeal No. 03-04, slip op. at 18-19 (Environmental Appeals Board, Sept. 27, 2006) (Petitioners challenged the Illinois Environmental Protection Agency's issuance of a PSD permit in part on the ground that the state agency failed to comply with the federal agency consultation requirements contained in ESA § 7.).

29 U.S.C. § 667(b). Once a state submits a proposed plan, the Secretary of Labor "**shall** approve the plan . . . if such plan in his judgment" meets eight criteria. 29 U.S.C. § 667(c)(1)-(8).[11] Like the other statutes provided above, if the Ninth Circuit decision is left to stand, the Secretary of Labor may have to disapprove a proposed state OSHA plan based on the effects that the plan would have on endangered species, despite the lack of any language in OSHA indicating that a plan could be denied on such a basis.

There are numerous other examples of mandatory statutory obligations that could be affected by the Ninth Circuit decision. *See e.g., Sierra Club v. Babbitt*, 65 F.3d 1502, 1509-11 (9th Cir. 1995) (The court held that ESA § 7(a)(2) consultation was not required for the approval of a logging road project because a right-of-way agreement between the Bureau of Land Management and timber company left no discretion to deny a permit to protect endangered species); *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66-69 (D.D.C. 2003) (The district court found that the Bureau of Reclamation had certain nondiscretionary duties to build and operate dams under the Colorado River Compact of 1922, and, thus, was not required to consult under ESA § 7(a)(2) in performing those duties); *Strahan v. Linnon*, 967 F. Supp. 581, 607-608 (D. Mass. 1997) (Coast Guard's issuance of Certificates of Documentation and Inspection was a nondiscretionary duty, and, therefore, did not trigger ESA § 7(a)(2)).

If Congress had intended for ESA § 7(a)(2) to prevail over mandatory EPA duties, it could have explicitly stated so in the language of the CWA or the ESA. Absent such

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[11] Like the CWA, one of the purposes of OSHA is to encourage "the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . ." 29 U.S.C. § 651(b)(11).

statutory language, ESA § 7(a)(2) should not be interpreted to effectively repeal mandatory EPA duties under the CWA. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)) ("The intention of the legislature to repeal 'must be clear and manifest.'"). The Ninth Circuit decision impermissibly ignores the language and intent of the CWA and ESA, creating a sweeping and unwarranted effect on the regulated community, including Coalition members, that should not be left to stand.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Nos. 06-340, 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HIGH PRODUCTION HOMEBUILDERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether, assuming that § 7 of the Endangered Species Act applies to non-discretionary agency action, this provision is nonetheless bounded by requirements of proximate causation that prevent interference with the delegation to Arizona of permitting authority under § 402 of the Clean Water Act.

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INTERESTS OF *AMICI CURIAE*[1]

Amici Beazer Homes USA, Inc., Centex Corporation, David Weekley Homes, Hovnanian Enterprises, Inc., KB Home, Kimball Hill, Inc., Lennar Corp., M.D.C. Holdings, Inc., Meritage Homes Corporation, M/I Homes, Inc., Pulte Homes, Shea Homes, Standard Pacific Corp., Toll Brothers, Inc., and Weyerhaeuser Real Estate Co. (collectively, "High Production Homebuilders") are 15 of the largest residential homebuilders in the Nation. *Amici* engage in residential construction on all scales, from the design of individual homes to the development of large residential communities. In 2005 alone, *amici* sold more than 262,000 homes, generating over $90.9 billion in revenue and representing over 20% of the United States new home market. In providing these homes to the Nation's population, *amici* not only satisfy a fundamental human need, they also promote a critical national priority, as Congress has reaffirmed over and over again.[2]

Before they begin homebuilding projects, *amici* typically must obtain permits under a variety of federal, state and local regimes. These include the type of Clean Water Act (CWA) permits at issue in this case, which allow point-source discharges to the waters of the United States. See CWA § 402, 33 U.S.C. § 1342. And they include other federal permits,

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

[2] *See* 42 U.S.C. § 1441 ("The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development ...."); *id.* § 12701 (affirming "the national goal that every American family be able to afford a decent home in a suitable environment"); *see also, e.g.*, National Housing Act of 1934, ch. 847, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701 *et seq.*); Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149; Department of Housing and Urban Development Act of 1965, Pub. L. No. 89-174, 79 Stat. 667.

such as permits for the discharge of fill material under § 404 of the CWA. *Id.* § 1344.[3] Before such federal permits may be issued, § 7 of the Endangered Species Act (ESA) generally requires the federal agencies permitting the undertaking – here, the Environmental Protection Agency (EPA) – to engage in "consultation" with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) and to ensure that their actions will not cause jeopardy to species.

The nature and scope of these inter-agency consultations and actions are profoundly important to *amici*, because they are immensely burdensome and time-consuming. The permitting process for a residential development can take years and cost hundreds of thousands of dollars – figures often compounded by interest-group litigation when the permit finally issues. And agency-ordered "alternative measures" may cost millions. Accordingly, *amici* have a substantial interest in ensuring that the consultation requirement remains within the boundaries established by Congress and the agencies' own regulations. The decision below fails to follow the proper scope of these authorities.

Like Petitioners EPA and NAHB, *amici* urge this Court to hold that, as a matter of law, the transfer of NPDES permitting authority from EPA to Arizona was nondiscretionary and therefore did not require ESA consultation at all. The focus of this Brief, however, is the question that this Court must address if it concludes that consultation was not categorically excluded: namely, the requisite causal relationship between an agency action and claimed jeopardy to species. This cau-

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[3] EPA has delegated the § 402 discharge permitting program to 45 of the 50 States (including Arizona). *See* USEPA, *National Pollutant Discharge Elimination System (NPDES): State Program Status*, *at* http://cfpub.epa.gov/npdes/statestats.cfm (last updated Apr. 14, 2003). However, the § 404 dredge and fill permitting program has been delegated to only two States, New Jersey and Michigan. *See* USEPA, *State or Tribal Assumption of the Section 404 Permit Program*, *at* http://www.epa.gov/owow/wetlands/facts/fact23.html (last updated Feb. 22, 2006).

sation requirement both triggers the consultation requirement and defines its scope. Under the text of the ESA, its implementing regulations, this Court's longstanding causation jurisprudence – and indeed any common-sense understanding of causation – the agency action must be a *proximate* cause of the claimed "jeopardy." That is, the agency must evaluate whether an action will result in harm to species that is *direct* and *foreseeable*, not remote, attenuated, or speculative.

The alternative the Ninth Circuit adopted – bare "but-for" causation – would force agencies to engage in far-reaching analyses of hypothetical effects. Moreover, it would foreclose any agency action that could imaginably result in harm, no matter how remote that possibility or how attenuated the chain of causation. This cannot be what Congress intended, which is why nothing in the statute, its regulations or its legislative history supports such an extreme result. Yet this is precisely what the Ninth Circuit held: The court below concluded that the simple act of transferring permitting authority from EPA to the State of Arizona would cause jeopardy to species, notwithstanding the substantial causal remoteness between this "action" and any surmised harm. This decision would amount to an extraordinary expansion of the ESA, which this Court should reject.

STATUTORY AND REGULATORY BACKGROUND

I. The § 7 consultation process arises out of the requirement that federal agencies "insure that any action [they] authorize[], fund[], or carr[y] out" is "not likely" to jeopardize any endangered or threatened species or to adversely modify critical habitat. 16 U.S.C. § 1536(a)(2); see generally *Bennett* v. *Spear*, 520 U.S. 154, 157-58 (1997). Consultation is an interagency dialogue between (1) the "action agency" that intends to authorize, fund, or carry out an action, and (2) the agencies with authority related to species (FWS and NMFS; collectively, the "Services"), and involving interested private parties, such as an applicant for a federal permit.

To determine whether consultation is required, the "action agency" first identifies whether a protected species or habitat exists within the proposed action area and whether the proposed action "may affect" the species or habitat. 50 C.F.R. § 402.14(a). If so, the "action agency" must engage in formal consultation with the Service, subject to two important exceptions. *Id.*; see Interagency Cooperation – Endangered Species Act of 1973, as amended, 51 Fed. Reg. 19,926, 19,941 (June 3, 1986) ("A Federal agency must initiate formal consultation if it determines that its action 'may affect' any listed species or its critical habitat unless it determines through informal consultation or biological assessment procedures, with the written concurrence of the Service, that its action 'is not likely to adversely affect' such species or habitat.").

Formal consultation requires the Service to prepare a "biological opinion" (BiOp) evaluating whether the action is "likely to jeopardize" a protected species. 50 C.F.R. § 402.14(h). During this evaluation – which often requires multiple rounds of discussions between the agencies – the "action agency" must provide substantial information to the Service. *Id.* § 402.14(c)-(g). If the Service ultimately reaches a "no jeopardy" conclusion, the action can go forward. *Id.* § 402.14(h). If, however, the Service concludes that the action is likely to jeopardize a protected species, it will recommend project modifications. *Id.* If no such alternatives exist, the agency must cancel the action, seek an exemption, or risk violating the ESA. A developer that proceeds without the blessing of the consultation process is in turn potentially subject to suit under § 9 of the ESA, with the attendant threat of civil and criminal penalties. See 16 U.S.C. §§ 1538, 1540(a), (b), (g).

II. The consultation process is fraught with problems, including delay and expense. See GAO, Pub. No. GAO-04-93, *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* (2004) ("GAO Report"). After examining several years' worth of consulta-

tion records, the GAO concluded that 30-40% of the Services' consultations exceeded the time frames established by statute or regulation. *Id.* at 3. Indeed, these statistics understate the delay, because they exclude the "sometimes significant amount of preconsultation time spent discussing a project before the consultation is considered to have officially begun" – a period during which the action cannot proceed. *Id.*; see also *id.* at 17 (noting that preconsultation time "may account for *the majority* of the time spent on the entire consultation process" (emphasis added)).

For a private party, the costs and delays of becoming entangled in consultation can be significant. For example, the listing of the bull trout caused the average processing time for permits to build private docks or structures on Lake Washington (near Seattle) to increase from 2-3 months to two *years*. *Id.* at 55-56. The pygmy owl listing caused delays of 5-18 months. See http://www.nahb.org/news_details.aspx?newsID=2379&sectionID=194 ("NAHB Release").

These burdens are compounded because the Services often push the bounds of their statutory and regulatory authority to and beyond their limits. According to the GAO, "action agency" officials reported "that the process had gotten out of control, that they were consulting on many more activities than was necessary, and that consultations were going beyond what was called for by the Endangered Species Act." GAO Report at 43. For example, "the Services sometimes recommend consultation when it is not really necessary and ... they request similarly unnecessary amounts of scientific analysis and documentation on potential effects." *Id.* at 39.

Agency delay and overreach beget private costs. These costs involve the actual expenses incurred during the consultation process; increased costs of unwarranted or unauthorized project modifications and mitigation; and of course opportunity costs. Applicants frequently must hire private consultants to assist in the preparation of biological assessments and mitigation plans and to negotiate with the agencies, often

at substantial cost. *Id.* at 55. In the case of the bull trout, permitting costs – which had been 5% of the total construction costs for a typical dock – rose to 33% of that total cost. *Id.* at 54. The consultation and project modifications ensuing from the pygmy owl listing added $1.7 - $2.7 million to the cost of a typical Arizona development. See NAHB Release. Similar stories abound, with compliance, consultation and mitigation giving rise to massive costs that an overly broad causation standard will only compound.[4]

SUMMARY OF THE ARGUMENT

The decision below depended in part on the erroneous conclusion that the ESA prohibits any agency action that could, under a but-for causation standard, result in "jeopardy" to protected species, no matter how tangential or remote the link might be. *Defenders of Wildlife* v. *EPA*, 420 F.3d 946, 962 (9th Cir. 2005). This interpretation finds no support in law or logic. Throughout the law, *proximate* causation is the dominant standard, and absent strong congressional intent to the contrary, serves as the default rule. Proximate cause is the core causation standard under the common law, as this Court has repeatedly recognized. It is the presumptive standard in federal statutes – even those with broad language of causa-

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[4] *See, e.g.*, Gillian Flaccus, *City May Shoo Endangered Fly*, Chi. Trib., Feb. 11, 2007 ("[Colton, California officials] say restrictions on building on the [Delhi Sands flower-loving fly] habitat have limited commercial growth and cost tens of millions of dollars in economic development."); Felicity Barringer, *Endangered Species Act Faces Broad New Challenges*, N.Y. Times, June 26, 2005 (citing Agua Caliente Band of Cahuilla Indians' claim that more than half the tribe's 31,000 acres fall into designated habitat, resulting in "'an economic impact of hundreds of millions of dollars'"); Mitch Tobin, *'Endangered' Cactus May Really Be Prolific*, Ariz. Daily Star, May 9, 2004 ("The [Pima pineapple] cactus may force one prominent builder to raise the price of 72 homes by $1,181 each. In the mid-1990s, the cactus threatened to add $10 million to the cost of a proposed 650-acre reservoir on the Southwest Side for the Central Arizona Project. The proposal was later shelved.").

tion. Environmental statutes such as the ESA are no exception. In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, for instance, all nine Justices treated proximate cause as the "ordinary requirement[]" and applied it to § 9 of the ESA. 515 U.S. 687, 696 n.9 (1995).

Nothing in § 7 of the ESA or its implementing regulations suggests that Congress intended to impose any standard other than the "ordinary" rule of proximate cause. To the contrary, the text and implementing regulations affirmatively show that § 7 incorporates the usual rule of proximate causation. Over and again, § 7 and its regulations employ terminology well-understood as denoting proximate cause. Moreover, the legislative history of the Act reveals a clear desire to avoid the costs and bureaucratic complications arising out of a regime predicated on but-for causation.

Here, the transfer of permitting authority from EPA to Arizona is far too remote from the hypothesized harm to satisfy proximate cause. The transfer itself does not authorize any harm to species at all – it authorizes no permit to issue and no development to occur, much less any activity that is intrinsically harmful. Instead, the transfer simply means that the Arizona agency may issue permits sometime in the future. Moreover, those permits do not themselves primarily induce development; individual development decisions are based on numerous independent, intervening factors, including the financial market, supply, demand, and political choice. And if development does occur, any harm to species remains speculative, especially because substantial other protections for species exist. Finally, the causal chain between the water discharge permits and the hypothesized harms to species – which are entirely "non-water quality related impacts," NAHB Pet. App. 562 (Elevation Document) – is far too attenuated to warrant application of the ESA.

ARGUMENT

I. THROUGHOUT THE LAW, PROXIMATE CAUSE – NOT MERE BUT-FOR CAUSE – IS THE DEFAULT RULE OF CAUSATION.

The view of causation adopted by the Ninth Circuit is without meaningful limit and would have absurd practical effects. It is, moreover, antithetical to the common-law understanding of proximate causation, as well as this Court's clear application of that principle to federal statutes in all areas of law. Particularly in the context at issue here, where the law requires agencies to predict, analyze, and mitigate the future effects of their proposed actions, it is essential to apply a proximate-cause standard that imposes sensible limits on agency inquiry and legal responsibility.

A. To Prevent Limitless Liability, Proximate Cause Is The Rule At Common Law.

It is a fundamental precept of statutory construction that Congress enacts statutes against the backdrop of the common law. Congress is presumed to know the standards that exist at common law and, absent a clear indication to the contrary, to incorporate them in the statutes it enacts. See, *e.g.*, *United States* v. *Wells*, 519 U.S. 482, 491 (1997). Nothing remotely suggests that Congress abrogated common-law principles when it enacted the ESA. See *Sweet Home*, 515 U.S. at 697 n.9, 700 n.13; see also *infra* Part II. Accordingly, to understand the causal relationship between an agency "action" and potential "jeopard[y]" to species that is necessary to trigger the ESA's statutory consultation requirement, 16 U.S.C. § 1536(a)(2), we begin with the common law.

For more than a century, the common-law rule of causation has been proximate cause. See, *e.g.*, 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898) ("The breach of duty, upon which an action is brought, must be not only the cause, but the *proximate cause*, of the damage to the plaintiff."); Charles

Fisk Beach, Jr., *A Treatise on the Law of Contributory Negligence or Negligence as a Defense* § 305, at 446 (3d ed. 1899) (proximate cause is "too firmly founded on reason and justice to be lost sight of in any discussion of liability for negligence"); William B. Hale, *Handbook on the Law of Torts* § 227, at 449 (1896). This Court has long recognized proximate cause as the common-law rule. See, *e.g.*, *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (using proximate cause under Federal Employers Liability Act, which incorporates common law standards); see also *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) (discussing the settled proximate cause standard at the end of the 19th century). And proximate cause continues to be the common-law rule today. See Restatement (Second) of Torts §§ 281(c), 430-462 (1965); Restatement (Third) of Torts: Apportionment of Liability § 3 (2000).

Proximate cause has been adopted so widely because the alternative – "but-for" causation – is no meaningful alternative at all. But-for cause merely asks whether the alleged harm would have occurred in the absence of (*i.e.*, "but for") the complained-of action. This rule leads to "extreme results," because "'the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.'" *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996); see also W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984) ("*Prosser & Keeton*") ("The event without millions of causes is simply inconceivable ...."); Restatement (Second) of Torts § 431 cmt. a. Given this truism, a statute dictating conduct or resting liability on mere but-for causation would be potentially limitless:

> "The chief and sufficient reason for [proximate cause] is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of

> events at the point beyond which experience and observation convince us we cannot press our inquiries with safety."

Associated Gen. Contractors of Cal., 459 U.S. at 532 n.24 (quoting T. Cooley, *A Treatise on the Law of Torts* 73 (2d ed. 1888)); *accord* 1 J.G. Sutherland, *A Treatise on the Law of Damages* 57 (1883).

Simply put, proximate cause is necessary "to hold the defendant's liability within some reasonable" – and objectively justifiable – "bounds." *Prosser & Keeton* § 44, at 302. And it serves to prevent liability from being imposed for "remote consequences." *Sweet Home*, 515 U.S. at 713 (O'Connor, J., concurring); *accord Southern Pac. Co.*, 245 U.S. at 533-34 ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss."). Proximate causation thus acts as a "tool[] to limit a person's responsibility for the consequences of that person's own acts." *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This tool reflects both "'ideas of what justice demands'" and "'of what is administratively possible and convenient,'" *id.* (quoting *Prosser & Keeton* § 41, at 264), as well as an effort to draw a line as to the "appropriate scope of responsibility," Dan D. Dobbs, *The Law of Torts* § 180, at 443 (2001). The inquiry thus works toward answering a single question: whether the complained-of action is "so closely connected with the result and of such significance that the law is justified in imposing liability." *Prosser & Keeton* § 41, at 264.

B. Proximate Cause Is The Default Rule For Federal Statutes.

1. Given the ubiquity of proximate causation at common law – and the practical necessity of the rule for preventing limitless liability – it is unsurprising that proximate cause is the default rule for federal statutory law. The rule of proxi-

mate cause has such force that this Court frequently has interpreted statutes that specify no particular causation standard as incorporating the usual rule of proximate cause. See *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1995-98 (2006); *Dura Pharms.* v. *Broudo*, 544 U.S. 336, 342-48 (2005); *Sofec*, 517 U.S. at 836-39 (1996); *Holmes*, 503 U.S. at 268; *Associated Gen. Contractors of Cal.*, 459 U.S. at 529-337; *Southern Pac. Co.*, 245 U.S. at 533-34.

In *Associated General Contractors*, for instance, this Court interpreted an exceptionally broad statutory provision as incorporating customary principles of proximate causation. The Clayton Act's private damages provision authorizes a cause of action for "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added). Although the Court observed that a "literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of" a forbidden act, it declined to impose such but-for liability, because that would "encompass every conceivable harm that can be traced to alleged wrongdoing." 459 U.S. at 529, 536; see also *id.* at 534 ("'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that *might conceivably be traced* to an antitrust violation.'" (emphasis added)). In short, to ensure that the inquiry of the courts remains squarely within manageable limits, doctrines such as foreseeability and proximate causation are applied.

This Court likewise has interpreted broadly worded racketeering and securities law provisions as requiring proximate cause. In *Holmes* v. *SIPC*, the Court evaluated the causation requirement of the Racketeering-Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* Like the Clayton Act, RICO requires only an injury "by reason of" a statutory violation. *Id.* § 1964(c). Noting that "[t]his language can, of course, be read to mean" that "the defendant's violation was a 'but for' cause of the plaintiff's injury," the

Court found it implausible that Congress intended to impose liability on such a thin basis. 503 U.S. at 265-66. The Court relied on the rationale that has supported the doctrine of proximate cause for more than a century:

> "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'"

Id. at 266 n.10. Practical considerations, too, militated against but-for causation: "[T]he less direct an injury is, the more difficult it becomes" to determine whether the injury is attributable to the complained-of conduct "as distinct from other, independent, factors." *Id.* at 269; *accord Anza*, 126 S. Ct. at 1998 ("The element of proximate causation ... is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.").

Dura presented a similar issue under the securities laws. Again, the statute did not specify the necessary causal connection; it simply required proof "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" 544 U.S. at 345-46. And again, this Court looked to "the common-law roots" of the cause of action, and held that the plaintiff "need[s] to prove proximate causation." *Id.* at 344.

2. These longstanding principles – which have applied to limit liability in *retrospective* damages inquires – are even more important where (as here) they involve a *prospective* inquiry. In the context of backward-looking liability, an injury already has occurred, and the case for relief is manifest. Yet even there, the law deems many actions to be too remote and tenuous to be the legal cause of an actual harm, and so embraces proximate cause.

Cases involving *prospective* inquiries, which involve huge administrative costs and carry the risk of substantial financial consequences, create even greater opportunity for endless hypothetical conjecture. As a result, without a meaningful proximate cause standard, suits for prospective relief would be limited only by the imagination of the plaintiff or, as here, the agency's speculation about what future effects might occur. Thus, there is no reason to treat causation differently in statutes requiring affirmative conduct – if anything, the justification for a meaningful proximate cause standard is stronger.

This Court recognized this concern in defining the effects that agencies must examine under the National Environmental Policy Act (NEPA). NEPA requires agencies engaging in "major Federal actions significantly affecting the quality of the human environment" to complete "a detailed statement ... on (i) the environmental impact of the proposed action, [and] (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(C). In *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), and again in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004), the Court held that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect," 541 U.S. at 767, and thus is insufficient to require the agency to analyze that effect under NEPA.

In *Metropolitan Edison*, the Court reasoned that NEPA requires "a reasonably close causal relationship between a change in the physical environment and the [prospective] effect at issue," which it interpreted as being "like the familiar doctrine of proximate cause from tort law." 460 U.S. at 776 (citing W. Prosser, *Law of Torts* ch. 7 (4th ed. 1971)). This was necessary to limit the drain on "time and resources" that would result if an agency were forced to examine hypothetical, attenuated effects:

> [A]gencies would, at the very least, be obliged to expend considerable resources .... The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.... [W]e cannot attribute to Congress the intention to ... open the door to such obvious incongruities and undesirable possibilities.

Id. (internal citation and quotation marks omitted). In this context, a rule of but-for causation would require the evaluation of an endless regression of causes and hypothesized, eventual effects. Proximate cause, accordingly, serves the necessary goal of conserving scarce agency resources:

> Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it. The scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' is to be accomplished.

Id. at 776 (quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978)). In short, the use of a but-for standard would sweep in so many possible effects, and the agencies' required analysis would as a result be so burdensome, that the core statutory goal would be undermined.

These considerations apply with even greater force here. Section 7 of the ESA, like NEPA, entails a prospective analysis of the "effects" that may flow from an agency action. But whereas NEPA simply requires "a detailed statement" of those effects, 42 U.S.C. § 4332(C), the ESA requires the agency to "insure" that such adverse effects do not occur. 16 U.S.C. § 1536(a)(2); see also *TVA* v. *Hill*, 437 U.S. 153, 173 (1978). Accordingly, FWS has recognized that "NEPA ... warrant[s] a *more* expanded review" than does the ESA. Interagency Cooperation, 51 Fed. Reg. at 19,933 (emphasis

added). The Ninth Circuit's contrary rule[5] would lead to wide-ranging inquiries into remote and hypothetical harms.

II. SECTION 7 OF THE ESA AND ITS IMPLEMENTING REGULATIONS INCORPORATE BASIC PRINCIPLES OF PROXIMATE CAUSE AND FORESEEABILITY.

A. This Court Has Interpreted ESA § 9 As Requiring Proximate Cause.

As *Metropolitan Edison* and *Public Citizen* demonstrate, environmental law is no exception to the presumptive rule of proximate cause. Those cases applied proximate cause to NEPA, and proximate cause is the rule in other environmental statutes as well. See, *e.g.*, *United States* v. *West of Eng. Ship Owner's Mut. Prot. & Indem. Ass'n (Lux.)*, 872 F.2d 1192, 1198-1200 (5th Cir. 1989) (Federal Water Pollution Control Act); *Benefield* v. *Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (Trans-Alaska Pipeline Authorization Act).[6] Indeed, this Court already has applied fundamental principles of proximate causation to the ESA. See *Sweet Home*, 515 U.S. 687.

Sweet Home involved § 9 of the ESA, 16 U.S.C. § 1538, which forbids the "knowing" "take" of an endangered or threatened species. Although this provision does not expressly use the terms "cause" or "proximate cause," the Court

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[5] *Cf. Defenders of Wildlife*, 450 F.3d at 404-05 (Berzon, J., concurring in denial of rehearing en banc) (wrongly concluding that the ESA requires a broader inquiry than NEPA).

[6] The presumption that statutes incorporate common-law principles of proximate cause is especially appropriate in the environmental arena, because environmental law was born of the common-law tort of nuisance. *See* Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 60-61 (4th ed. 2003). Nuisance doctrines long have contained a proximate cause requirement. *See, e.g.*, Restatement (Second) of Torts § 822 (private nuisance); *County of Westchester* v. *Town of Greenwich*, 76 F.3d 42, 45 (2d Cir. 1996) (public nuisance).

easily found it to incorporate "ordinary requirements of proximate causation and foreseeability." 515 U.S. at 697 n.9 (interpreting the phrases "knowingly violates" and "otherwise violates" to incorporate proximate causation and foreseeability); see also *id.* at 701 n.13 (same).

The concurring and dissenting Justices all agreed that the ESA incorporates foreseeability and proximate cause. See *id.* at 712 (O'Connor, J., concurring) ("I see no indication that Congress ... intended to dispense with ordinary principles of proximate causation."); *id.* ("In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable ... only if their ... actions proximately cause [the prohibited results]."); *id.* at 732 (Scalia, J., dissenting) ("I quite agree that the statute contains" a proximate cause requirement, "because the verbs of purpose in [§ 9] denote action directed at animals."). In short, "[i]n the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable [under § 9] only if their ... actions proximately cause death or injury to protected animals." *Id.* at 712 (O'Connor, J., concurring).

As the concurring opinion further explained, proximate cause serves a critical function in limiting legal responsibility within sensible and just boundaries. And that fundamental purpose applies with full force to the ESA. Because "proximate causation 'normally eliminates the bizarre,'" the application of proximate cause prevents the creation of duties and the imposition of liability for "remote consequences" that this Court has recognized to be beyond the ESA's reach. *Id.* at 713 (O'Connor, J., concurring) (citations omitted).

B. Section 7 Of The ESA Likewise Requires Proximate Cause.

1. The same bedrock principles of causation that *Sweet Home* found in § 9 of the ESA apply to § 7 of that statute as well. As in *Sweet Home*, nothing in the statute or regulation indicates that the "ordinary" rule of proximate causation

should not apply to § 7. To the contrary, the text of § 7 demonstrates that Congress affirmatively incorporated proximate causation into the statute, just as it did in § 9.

There can be little doubt that the language of § 7 contains a causation requirement. Section 7(a)(2) requires federal agencies to

> insure that any action authorized, funded, or carried out by such agency ... is *not likely to jeopardize* the continued existence of any endangered species or threatened species or *result in* the destruction or adverse modification of habitat of such species.

16 U.S.C. § 1536(a)(2). Just as the term "harm" is defined as "to *cause* hurt or damage to," *Sweet Home*, 515 U.S. at 697 (emphasis added), the verb "jeopardize" at issue here means "*to cause* (something) to be harmed or damaged." *Cambridge Dictionary of American English* 469 (2000) (emphasis added); see also *Sweet Home*, 515 U.S. at 732 (Scalia, J., dissenting) (recognizing that "the verbs of purpose in [§ 9] denote action directed at animals," and therefore implicate proximate cause). What is more, the statutory phrase "result in" is a synonym for "cause." A "cause" leads to a "result," and an action that "results in" an effect is the cause of that effect. See *Roget's II: The New Thesaurus* 831 (1988) ("result in" is a synonym for "[t]o be the cause of"); see also *National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 745 (5th Cir. 1988) ("[t]he phrase 'resulting from or incident to' clearly suggests a causal connection, which ... certainly does require some type of limiting principle of proximate causation").

Thus, nothing in the statute indicates that § 7 departs from the "ordinary" rule of proximate cause – the basic text is to the contrary. Indeed, additional statutory terms confirm the existence of such a requirement. Under § 7, the "action agency" must ensure that its conduct is "not likely to" cause jeopardy or result in the destruction of habitat. 16 U.S.C. § 1536(a)(2). This language of "likelihood" is commonly

used to denote proximate cause. See, *e.g.*, *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989) (linking proximate causality to whether a result was "likely"); *Waters-Pierce Oil Co.* v. *Deselms*, 212 U.S. 159, 179 (1909) (tying proximate cause to the "likely ... result").

2. The legislative history of § 7 further demonstrates that Congress drafted the statute to ensure that agencies would not be forced to evaluate and mitigate remote and speculative harms. The statute originally commanded agencies to make certain that their actions "*do[] not* jeopardize species.[7] The statute was amended in 1979 to reflect the current text, which requires agencies to "insure" that their actions are "not *likely to*" jeopardize species. 16 U.S.C. § 1536(a)(2). The Conference Committee explained that Congress made this change because

> [a]s currently written ... the law could be interpreted to force the [consulting agency] to issue negative biological opinions whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize the continued existence of the listed species or adversely modify its critical habitat.

H.R. Conf. Rep. No. 96-697, at 12 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576. This statement plainly reveals Congress's intent that agencies review only the direct and foreseeable impacts of their actions on species, and not engage in purely hypothetical analyses of remote and speculative chains of causation.

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[7] The pre-1979 version of statute read:

> All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [this Act] by taking such actions necessary to insure that actions authorized, funded, or carried out by them *do not jeopardize* the continued existence of such endangered species and threatened species or result in the destruction or modification of [critical] habitat of such species ....

16 U.S.C. § 1536 (1976) (emphasis added).

3. The implementing regulations are consistent with the statute – as they must be – and incorporate the same customary standards of proximate causation and foreseeability. At the threshold, they require each "action agency" to "review its actions ... to determine whether any action may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a). If so, some form of consultation is required. See *supra* at 3-4 (discussing the consultation process). And, at each step along the way, the regulations governing the consultation process sound in (and perform the function of) proximate cause – *viz.*, "to hold the [inquiry] within some reasonable bounds." *Prosser & Keeton* § 44, at 302.

Thus, during consultation, the relevant Service must determine whether the action "is *likely to jeopardize*, 50 C.F.R. § 402.14(g)(4), or "*likely to adversely affect*," *id.* § 402.13(a), species or habitat (emphases added). As noted above, the language of action and "likelihood" commonly are used to embrace proximate cause. In addition, the phrase "jeopardize the continued existence of" is defined as "engag[ing] in an action that *reasonably would be expected*, directly or indirectly, to *reduce appreciably the likelihood* of both the survival and recovery of a listed species." *Id.* § 402.02 (emphasis added). Again, this language of reasonable expectation and reasonable likelihood invokes fundamental precepts of proximate cause. See, *e.g.*, *Metropolitan Edison Co.*, 460 U.S. at 774 (interpreting the statutory term "reasonably close causal relationship" as invoking proximate cause"); *Prosser & Keeton* § 41, at 263 (proximate cause requires a "reasonable connection" between the act and the damage); *id.* § 43, at 300 (invoking a "reasonably close connection").[8]

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[8] Similar standards govern the informal consultation process. *See* 50 C.F.R. § 402.13. Specifically, "the consultation process is terminated" if "the action is not *likely to adversely affect* listed species or critical habitat." *Id.* § 402.13(a) (emphasis added).

Moreover, in conducting their analyses, the Services are obliged to examine the "effects of the action" proposed, as well as "cumulative effects." 50 C.F.R. §§ 402.12(a), 402.14(g)(3). The "effects of the action" are defined as "direct" effects and "indirect" effects. *Id.* § 402.02.[9] The phrase "direct effects" obviously denotes proximate cause. See *Prosser & Keeton* § 43, at 294 n.13 ("direct" is "a general synonym for 'proximate'"); *Sweet Home*, 515 U.S. at 732 (Scalia, J., dissenting) ("'[P]roximate' causation simply *means* direct causation."). In addition, the regulations specifically define the terms "indirect" and "cumulative" effects to embody notions of proximate causation. See 50 C.F.R. § 402.02 (defining "indirect effects" as "those that *are caused by* the proposed action and are later in time, *but still are reasonably certain to occur*" (emphasis added)); *id.* (defining "cumulative effects" as "those effects of future State or private activities ... that are *reasonably certain to occur*"); Interagency Cooperation, 51 Fed. Reg. at 19,933 (excluding "speculative actions" from "the 'cumulative effects' analysis"). Indeed, this Court held in *Sweet Home* that "indirect" effects, 515 U.S. at 697-98, incorporate principles of proximate cause, *id.* at 696 n.9, 700 n.13.[10]

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[9] The "effects of the action" also include "effects of other activities that are interrelated or interdependent with that action." 50 C.F.R. § 402.02. Contrary to the court's *sua sponte* analysis below, 420 F.3d at 972-73, "interrelated" and "interdependent" actions are not at issue here, because any future development is not "part of a larger action" (the transfer of authority to Arizona); does not "depend on the larger action for [its] justification"; and does not lack "independent utility apart from the action under consideration." 50 C.F.R. § 402.02. Tellingly, in quoting the regulation the opinion below omitted much of this critical limiting language.

[10] In one sentence, the BiOp states that FWS "uses the 'but for' test." NAHB Pet. App. 112. But this statement, unsupported by any citation, is contrary to the statute and regulations. Even if it were not, FWS cannot be referring to "but for" causation as typically understood, given that the same paragraph of the BiOp equates but-for causation with the "substantial factor" test which is an alternative standard altogether. *Id.*; *see Prosser & Keeton* § 41, at 265-68.

III. THE DECISION BELOW IMPROPERLY ABANDONED TRADITIONAL CONCEPTS OF PROXIMATE CAUSATION AND EMPLOYED AN EXTREME VERSION OF BUT-FOR CAUSATION.

The Ninth Circuit's decision abandoned the bedrock principle of proximate cause. Rejecting the argument that "it is private development, not the EPA's transfer decision, that would cause any impact on listed species," the panel adopted a "but for" causation standard, observing that "[e]vents can be caused by several actions *in a 'but-for' causal chain.*" *Defenders of Wildlife*, 420 F.3d at 962 (emphasis added). The court offered no real explanation for this departure from basic causation principles, but instead stated simply that:

> Obviously, without private decisions to construct new developments, there will be no Clean Water Act construction permits and no impact from the issuance of such permits on listed species or their habitats. Just as obviously, without the transfer of permitting authority from the federal to the state government, developers could be required, as they were before the transfer decision, to mitigate any impact from their development decision.... The Biological Opinion's determination to the contrary disregards the obvious cause analysis ....

Id. at 961-62.

The panel below did not purport to hold that the transfer of permitting authority was a *proximate* cause of jeopardy to species – and properly so. The chain of events that purportedly links the transfer of permitting authority to the hypothesized jeopardy entails precisely the type of "remote consequences," *Southern Pac. Co.*, 245 U.S. at 533-34, and "ripples of harm," *Associated Gen. Contractors of Cal.*, 459 U.S. at 534, that are the antithesis of proximate cause.

Specifically, before jeopardy to species could occur here, the following lengthy chain of intervening events would have to occur:

1) EPA transfers NPDES permitting authority to the State of Arizona;

2) Arizona establishes conditions for issuing CWA permits that provide no meaningful substitute for federal ESA consultation;

3) A developer proposes to construct a development;

4) The developer determines whether the development requires an NPDES permit and, if so, applies for it;

5) Arizona determines whether to grant the NPDES permit to the developer, and grants it;

6) The developer acquires any federal permits required to construct the development – for example, a dredge-and-fill permit under CWA § 404, which is not delegated to the State and which may itself trigger ESA consultation;

7) The developer acquires all of the other state, local, and financial approvals required to construct the development;

8) The developer constructs the development and – ignoring the ESA § 9 prohibition against taking species – harms a species of concern.

This causal chain is far too remote and attenuated to satisfy any notion of proximate cause. See *Metropolitan Edison*, 460 U.S. at 774 ("Some effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [NEPA] § 102 because the causal chain is too attenuated."); Restatement (Second) of Torts § 433(a) (causation is determined, in part, with reference to "the number of other factors which contribute in producing the harm"). Simply put, "Congress did not intend that

Federal actions be precluded by such speculative actions." Interagency Cooperation, 51 Fed. Reg. at 19,933.[11]

First, the "agency action" itself will not proximately cause any harm to species. Far from it: All that is at issue here is "an administrative transfer of authority" that "will not cause development." NAHB Pet. App. 113 (BiOp); *id.* at 114-17 (observing that jeopardy or habitat alteration is not a natural or inevitable byproduct of the transfer of authority).[12] The transfer does not "authorize" a single development; it does nothing more than change the conditions under which development might occur. *Id.* at 80.

That is not enough to establish causation. Causation turns on whether the defendant's conduct has "created a force or series of forces which are in continuous and active operation up to the time of the harm," and it is not enough simply to "create[] a situation harmless unless acted upon by other forces for which the actor is not responsible." Restatement (Second) of Torts § 433(b). Here, this basic requirement is not met. The transfer of permitting authority from EPA to the State of Arizona does not set in motion "forces [that] are in continuous and active operation up to the time of" jeopardy to species. It simply establishes a condition under which, if a

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[11] Indeed, this causal chain is so attenuated that it raises serious questions about Respondents' standing. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (standing requires a showing of causation). As the D.C. Circuit recognized in the NEPA context, "[s]uch a protracted chain of causation fails [to provide standing] both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." *Florida Audubon Soc'y* v. *Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (en banc).

[12] *See also* Biological Evaluation for Endangered Species Act Consultation on USEPA's Proposed Approval of the State of Arizona's NPDES Program (June 21, 2002) ("Biological Evaluation") (NAHB Pet. App. 615, 617) (proposed action is "an administrative shift of authority and is not associated with any physical action that will alter habitat or affect biota").

variety of other circumstances come to pass, effects on species someday may result.

Second, a variety of complicating and intervening factors further attenuate causation. At bottom, the Ninth Circuit's concern was that a permit issued by Arizona under the transferred authority might allow private development. However, "[d]evelopments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability." NAHB Pet App. 113 (BiOp). This Court has rejected causal chains far less tenuous than this one. In *Holmes*, for instance, the Court rejected a RICO claim as too "remote," reasoning that "the less direct an injury is, the more difficult it becomes to ascertain the [injury] attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269. Here, the presence of such independent causal factors would require even more speculation than the Court declined to approve in *Holmes*: "EPA's CWA-mandated approval of the program has only an attenuated causal link to the reduction in Federal ESA conservation responsibilities." NAHB Pet. App. 117 (BiOp); *accord Anza*, 126 S. Ct. at 1998 (no proximate cause when a court would have to engage in a "speculative" inquiry); *Southern Pac. Co.*, 245 U.S. at 533 ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step.").

Third, the State of Arizona is an intervening independent actor, displacing the EPA as the principal "authorizer" of any development. "[T]he common law is clear that certain intervening events – otherwise called 'superceding causes' – are sufficient to sever the causal nexus and cut off all liability." *Archer* v. *Warner*, 538 U.S. 314, 326 (2003); Restatement (Second) of Torts §452(2) ("Where ... the duty to prevent harm to another ... is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause."). One such "intervening event" is independent action by another entity. See, *e.g.*, *Siggers* v.

Barlow, 906 F.2d 241, 243-47 (6th Cir. 1990); *cf. Bennett* v. *Spear*, 520 U.S. at 167 (for there to be standing, the alleged injury "must be fairly traceable to the challenged action of the defendant, and not the result of some independent action of some third party not before the court"). Here, Arizona makes the ultimate decision whether to issue a particular permit, and thus is a superceding cause.

Fourth, *if* development is authorized by an Arizona water discharge permit, and *if* it does occur, the Ninth Circuit's hypothesized chain of causation further assumes that no other protections for species exist. This is simply wrong. Arizona's individual permitting decisions will be made in light of the numerous state and local laws that protect endangered and threatened species.[13] Indeed, it was due in part to the existence of such laws that the Biological Evaluation concluded "that any potential adverse effects to Federally-listed species or critical habitat would be insignificant and/or discountable." NAHB Pet. App. 615-16.

Moreover, numerous federal species-protective mechanisms make it speculative whether jeopardy to species will ultimately result. FWS took these protections into account. See NAHB Pet. App. 101-11 (BiOp). For instance, if the development requires a permit from some other federal agency – for example, a dredge-and-fill permit – ESA consultation still may be required. In addition, ESA § 9 imposes civil and criminal penalties for "tak[ing]" any listed species or destroying critical habitat." 16 U.S.C. § 1538; see NAHB

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[13] In Arizona, "a Sonoran Desert Multi-Species Conservation Plan is currently being drafted to protect the species of greatest concern including a cactus ferruginous pygmy-owl and Pima pineapple cactus." NAHB Pet App. 115 (BiOp). Arizona law prohibits the taking of native plants from any land within the State without following certain procedures. Ariz. Rev. Stat. § 3-904. In fact, the BiOp noted that Arizona's administration of the permitting program "[w]ould provide significant environmental benefits" because Arizona has substantially more staff than EPA in the relevant offices. NAHB Pet. App. 82-83.

Pet. App. 105-06, 112 (BiOp). The prospect that that provision will be violated is purely speculative, and such a violation would in any event break the chain of causation. See *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984) (rejecting the argument that "consideration of environmental effects caused by reasonably foreseeable criminal acts of third parties" must be considered), *overruled in part on other grounds as explained in Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988); *Loggerhead Turtle* v. *County Council*, 92 F. Supp. 2d 1296, 1307, 1308 (M.D. Fla. 2000); see also *Strahan* v. *Coxe*, 127 F.3d 155, 164 (1st Cir. 1997) (issuance of a license that can be used "in a manner consistent with both state and federal law" is not a "cause" of illegal conduct resulting from misuse of that license). ESA § 10 provides an additional mechanism to minimize jeopardy to protected species, in the form of "incidental take" permits – and as the BiOp recognized, the possibility that such permits would not be obtained is "speculative." NAHB Pet. App. 114-15.[14]

Furthermore, the ESA holds no monopoly over species protection. The CWA affords "substantive ... protections ... to Federally-listed species and critical habitat under the [EPA] permit program," and those protections "will continue under the [Arizona] permit program." *Id.* at 616 (Biological Evaluation). And the Biological Opinion enumerated a variety of ways in which EPA and FWS would superintend Arizona permitting decisions in order to protect species. *Id.* at 101-05.

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[14] The court below discounted §§ 9 and 10 on the theory that they are not perfect "substitutes for section 7 coverage." 420 F.2d at 975. Even if true, these provisions' protective effect attenuates the causation between a transfer of permitting authority and the possibility of jeopardy to species. Indeed, the court properly conceded that §§ 9 and 10 are "important provisions," and discounted them only by asserting that "there is no indication [in the record] that section 9 is or will be enforced meaningfully." *Id.* at 975. This is a federal statute backed by civil and criminal penalties, and so its deterrent effect should be plain.

Fifth, this remote and hypothetical causal chain is broken because the purview of the permitting program at issue here is water quality, and the species of concern in this case – the Pima pineapple cactus, as well as the now-delisted pygmy owl[15] – are not asserted to be affected by water quality. Rather, the species were thought to be potentially subject to "*non*-water quality related impacts." NAHB Pet. App. 562 (Elevation Document) (emphasis added).[16] This is not enough. See *Natural Res. Def. Council, Inc.* v. *EPA*, 822 F.2d 104, 128-31 (D.C. Cir. 1987) (EPA's CWA authority over discharge permits does not create jurisdiction over land-based construction). Put another way, even assuming that a transfer of permitting authority could be a cause of jeopardy to species, it would only be through water-quality-related impacts – and here, there would be no such impacts. Accordingly, transferring the wastewater discharge permitting proc-

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[15] Although the Arizona branch of the FWS initially identified two species as being affected by the permitting transfer program, NAHB Pet. App. 562, 563, one of those species – the pygmy owl – is no longer on the endangered or threatened species list. Final Rule to Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl From the Federal List of Endangered and Threatened Wildlife, 71 Fed. Reg. 19,452 (Apr. 14, 2006).

[16] The Pima pineapple cactus "grows in alluvial basins or on hillsides in semi-desert grassland and Sonoran desertscrub in southern Arizona and northern Mexico." *See* Arizona Ecological Servs. Field Office, FWS, *Pima Pineapple Cactus*, *at* http://www.fws.gov/southwest/es/arizona/Documents/Redbook/Pima%20Pineapple%20cactus%20RB.pdf (June 2000); *see also generally* http://www.fws.gov/southwest/es/arizona/pima.htm (last visited Feb. 19, 2007). The pygmy owl is also a desert upland species, "found primarily in Sonoran desert scrub vegetation with some locations in riparian drainages and semi-desert grassland vegetation communities." *See* Arizona Ecological Servs. Field Office, FWS, *Cactus Ferruginous Pygmy-Owl*, *at* http://www.fws.gov/southwest/es/arizona/Documents/Redbook/Cactus%20Ferruginous%20Pygmy%20owl.pdf (Jan. 2003); *see also generally* http://www.fws.gov/southwest/es/Arizona/Documents/PublicReview/CFPO/FINAL_REV_PROTOCOL.pdf (Jan. 2000).

ess from EPA to Arizona cannot be considered a "cause" of the harm contemplated by Respondents.

* * * *

Proximate causation is a fundamental principle throughout the law. This Court has recognized its role in § 9 of the ESA, and it likewise is the rule in § 7 of the statute. The Ninth Circuit's contrary conclusion was mistaken. And its finding of a causal relationship on a highly attenuated theory of but-for causation does not satisfy proximate cause, because the permitting decision is remote from any theoretical jeopardy to species, and because of the numerous intervening and superceding causes.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 06-549

IN THE

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF KERN COUNTY WATER AGENCY, LOST HILLS WATER DISTRICT, WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT, ENTERPRISE IRRIGATION DISTRICT, KLAMATH BASIN IMPROVEMENT DISTRICT, KLAMATH DRAINAGE DISTRICT, KLAMATH IRRIGATION DISTRICT, KLAMATH HILLS DISTRICT IMPROVEMENT CO., MALIN IRRIGATION DISTRICT, MIDLAND DISTRICT IMPROVEMENT CO., PINE GROVE IRRIGATION DISTRICT, POE VALLEY IMPROVEMENT DISTRICT, SHASTA VIEW IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, TULELAKE IRRIGATION DISTRICT, AND WESTSIDE IMPROVEMENT DISTRICT NO. 4 IN SUPPORT OF PETITIONER

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BRIEF OF SEVENTEEN WATER DISTRICTS AS AMICI CURIAE SUPPORTING PETITIONER

Amici curiae respectfully submit that the judgment below should be reversed.[1]

INTERESTS OF AMICI CURIAE

Amici curiae are seventeen water districts in Oregon and California, each of which holds the state-granted right to receive water under state law. Each has already lost some of the water granted to it by state law as a result of the application of the federal Endangered Species Act (ESA). A decision of this Court expanding federal authority under Section 7 of the ESA would further reduce their already impaired state-granted water rights.

Amici curiae, Tulare Lake Basin Water Storage District, Wheeler-Ridge Maricopa Water Storage District, Lost Hills Water District, and Kern County Water Agency, are located in the Central Valley of California. Each of these amici is the beneficiary of water rights granted by the California State Water Resources Control Board. Tulare Lake Basin Water Storage District and Kern County Water Agency have contracts directly with the State Water Project. Lost Hills Water District and Wheeler Ridge-Maricopa Water Storage District, in turn, have subsidiary contracts with the Kern County Water Agency. Amici supply water for agricultural, municipal, and industrial uses. They

[1] Pursuant to this Court's Rule 37.6, the amici state that no counsel for a party authored this brief in whole or in part. No one other than the counsel of the amici made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties.

successfully sued the federal government in the United States Court of Federal Claims to recover just compensation under the Fifth Amendment for the taking of their water to protect two species of fish listed as endangered under the federal ESA. *See Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

Amici curiae, Enterprise Irrigation District, Klamath Basin Improvement District, Klamath Drainage District, Klamath Hills District Improvement Company, Klamath Irrigation District, Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Tulelake Irrigation District, and Westside Improvement District No. 4, are located in the Klamath Basin of southern Oregon and northern California. Each of these amici is the beneficiary of water rights granted by the Oregon Water Resources Department. These districts supply water to several towns, as well as approximately 176,000 acres of farmland. These amici have sued the federal government in the United States Court of Federal Claims in order to recover just compensation under the Fifth Amendment for the taking of their water to protect three species of fish listed as endangered under the federal ESA. *See Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005). This case is pending.

STATEMENT OF THE CASE

The Clean Water Act (CWA) limits the Environmental Protection Agency's (EPA) authority to deny a State the ability to take over the Clean Water Act pollution permitting program within its borders from the federal EPA. The CWA provides that the EPA "shall" transfer pollution permitting authority, under the National Pollution Discharge Elimination System, to a State, if the State's proposal

requesting transfer meets nine statutory criteria. *See* 33 U.S.C. § 1342(b). None of the nine statutory criteria involves endangered species or refers to the Endangered Species Act. Nevertheless, the court of appeals held that the ESA supersedes a State's right under the CWA to administer water pollution permitting within its borders regardless of whether the State's proposal meets the nine criteria.

Thus, the court of appeals remanded back to the EPA the EPA's decision to transfer pollution permitting authority to the State of Arizona, despite the fact that there is no dispute that Arizona's proposal met all nine statutory criteria. Indeed, the Fish and Wildlife Service issued a biological opinion determining that any impact transfer would have on endangered species was the result of: (1) Congress' decision to make Section 7 of the ESA inapplicable to the States; and (2) Congress' decision to require transfer of the permitting process to the States, provided the nine criteria were met (none of which included consideration of endangered species). *Defenders of Wildlife v. EPA*, 450 F.3d 394, 396 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc)

The court of appeals, however, incorrectly rejected the agency's interpretation of the ESA as it applies to the transfer provision of the CWA. The court of appeals held that "the EPA did have the authority to consider endangered species in making the transfer decision, and erred in determining otherwise." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 950 (9th Cir. 2005). Accordingly, the court of appeals determined that under the Administrative Procedures Act, EPA's decision was arbitrary and capricious.

The court of appeals decision was erroneous, and, more importantly, has far-reaching effects on the scope of the ESA. As Judge Kozinski stated in dissent from the denial of

rehearing en banc, the court of appeals' "holding—that the ESA imposes an affirmative duty on a federal agency to protect endangered species, even in the face of a governing statute that explicitly precludes the agency from doing so—contradicts FWS's statutory interpretation, ignores the very recent instructions of the Supreme Court, and creates a conflict with two other circuits." *Defenders of Wildlife*, 450 F.3d at 401 (Kozinski, J., dissenting from denial of rehearing en banc).

The effects of the court of appeals decision go well beyond the CWA pollution permitting transfer decision at issue in this case. If allowed to stand, the court of appeals decision will have lasting effects on other programs administered by the States. In particular, the decision will permit, and in some instances could force, federal agencies to interfere in a State's water allocation decisions. This is because the decision holds that "*any* action which comes within a federal agency's decisionmaking authority falls within the scope of Section 7(a)(2) of the Endangered Species Act." 420 F.3d 946, 979 (9th Cir. 2005) (Thompson, J., dissenting). Traditionally, however, it has been understood that water allocation within a State comes within that State's authority—not the authority of the federal government. The court of appeals' decision thus threatens that traditional understanding.

SUMMARY OF ARGUMENT

Interpreting the Endangered Species Act as a generic grant of additional legal power to every federal agency at the expense of the States' authority (as the court of appeals did in this case) will upset the delicate process of allocating the nation's precious water resources, a power thus far reserved to the States. Although Section 7 of the ESA certainly requires that federal action agencies utilize their existing

statutory authority to protect endangered species, nothing in the language or history of that provision suggests that Congress intended by that section to impliedly repeal all limitations on federal agency authority where species protection is concerned. Indeed, the Clean Water Act itself demonstrates Congress' intent that traditional state functions, including water allocation, should not be disturbed. Clean Water Act, 33 U.S.C. § 1251(g) (providing "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter").

In this time of growing scarcity in the nation's freshwater resources, States are struggling to conserve water and to distribute it in the most efficient and fair manner possible. The court of appeals' cavalier disregard of state primacy in water allocation (as well as pollution control) ignores this Court's repeated observation that through the history of Western water allocation runs the consistent thread of congressional deference to state water law. *California v. United States*, 438 U.S. 645, 653 (1978).

As Judge Kozinski noted in his dissent from the denial of rehearing en banc, adoption of the rule announced by the court of appeals would affect a vast array of established programs, in addition to state delegation under the Clean Water Act: "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife*, 450 F.3d at 399 n.4 Kozinski, J., dissenting from denial of rehearing en banc). One such program is the allocation of water supplies for municipal, industrial, and agricultural use across the country, but especially in the arid West; in fact, the rights of water users have already come into conflict with the Endangered Species Act, resulting in extensive litigation.

See, e.g., Orff v. United States, 545 U.S. 596 (2005); *Bennett v. Spear*, 520 U.S. 154 (1997); *Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005); *Westlands Water Dist. v. Dept. of Interior*, 376 F.3d 853 (9th Cir. 2004); *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999).

A decision by this Court in favor of respondent and upholding the court of appeals' ruling would unhinge the intricate legal machinery that has so far governed the allocation of limited supplies of fresh water, and possibly implicate constitutional issues of federalism as well. These amici, who have found themselves struggling to provide supplies to their water users in the face of limitations imposed under Section 7 of the ESA, urge this Court to reject respondent's argument that this provision of the ESA impliedly repealed the statutory and jurisprudential limitations on federal agency power to disrupt the States' long-recognized statutory (and perhaps constitutional) authority to allocate the water flowing within their borders.

ARGUMENT

I. The Endangered Species Act Has Already Clashed with Amici's State-Created Water Rights

This Court has already seen cases arising out of the conflict between the water demands for endangered fish and the state-created water rights of people. In *Bennett v. Spear*, 520 U.S. 154 (1997), this Court found that Klamath water users had standing to challenge a biological opinion that impaired their water rights, and in *Orff v. United States*, 545 U.S. 596 (2005), this Court held that the water district, rather than the individual water users, was the proper party to sue

for water loss resulting from the re-programming of 800,000 acre-feet of Sacramento Delta water from agriculture to fish protection. These amici curiae, too, have already lost water to endangered species—water to which they were entitled under the state law of California and Oregon.

In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), four of these amici (Tulare Lake Basin Water Storage District, Kern County Water Agency, Lost Hills Water District, and Wheeler Ridge-Maricopa Water Storage District) brought suit for a taking of their state-granted water rights when biological opinions issued by federal agencies under the ESA reduced their ability to receive water to which they were entitled from the California State Water Project. Upholding California's right to allocate its water, the court there held:

> [T]he responsibility for water allocation is vested in the State Water Resources Control Board ("SWRCB") [and the California courts], *see* CAL. WATER CODE §§ 174, 179; *California v. United States*, 438 U.S. 645, 693 (1978). Once an allocation has been made – as was done in D-1485 [(the SWRCB's decision establishing a comprehensive water rights scheme balancing the needs of and allocating water rights among competing users)] – that determination defines the scope of plaintiffs' property rights . . . .

Tulare Lake, 49 Fed. Cl. at 322.

Furthermore, the court noted that "plaintiffs' contract rights in the water's use [are] superior to all competing interests," and the "contracts confer on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent

with the terms of the permits issued to the [Department of Water Resources] by the State of California." *Id.* at 318. Holding that "[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so," *id.* at 324, the court awarded these amici approximately $25 million for the taking of 297,334 acre-feet of water[2] to which they were entitled under state law. *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246, 266 (2003).

Still pending before the U.S. Court of Federal Claims is *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (2005), a suit by thirteen amici (Enterprise Irrigation District, Klamath Basin Improvement District, Klamath Drainage District, Klamath Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Co., Pine Grove Irrigation District, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Tulelake Irrigation District, and Westside Improvement District No. 4) that supply water to 1,400 farm families in the Klamath Basin of Oregon and California. At issue in *Klamath* is the water that was to be used to irrigate 176,000 privately owned acres of land in the western portion of the Klamath Project in 2001. Under the authority of the ESA, the Bureau of Reclamation refused to deliver approximately 350,000 acre-feet of this water, which it retained in Klamath Lake for the benefit of three species of endangered fish.[3] Meanwhile, commercial fishermen and

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[2] An acre-foot of water is the volume of water, 43,560 cubic feet, that will cover an area of one acre to a depth of one foot.

[3] Irrigators' direct financial losses from Reclamation's failure to supply water in 2001 have been estimated to be at least $28–35 million. Additionally, "more than two thousand jobs have been lost, farms have lost $74 million in revenue from

others have also sued the United States, claiming that it has failed to provide enough water for the fish. *See, e.g., Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005).

Should this Court endorse the court of appeals' expansionist view of Section 7 without preserving existing state-created water rights, all of the water in the Sacramento Delta, Klamath Basin, and elsewhere would immediately come under federal authority, robbing States of their traditional power over water allocation and dumping the water distribution function upon federal agencies that are ill-equipped to administer it. The result is likely to be chaos in Western water distribution, resulting in shortages, waste, and misallocation by federal officials who have neither the resources nor the experience to allocate and deliver this life-giving resource to those who put it to beneficial use.

II. The Growing Scarcity of Water Makes Future Conflicts with the Endangered Species Act Inevitable

The increase in global populations and the increasing scarcity of water resources world-wide has already introduced conflicts into the mechanisms of water allocation. In the western United States in particular, "[u]rban demands and environmental needs are placing increased pressure on scarce water resources. . . . In addition, the potential for global climate change to reduce water availability in parts of the West is very real." Olen Paul Matthews et al., *Marketing Western Water: Can a Process Based Geographic*

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the cutoff and drought, and the regional economy has suffered losses of $134 million." Julia Muedeking, *Taking the Heart of the Klamath Basin: Is It Free?*, 8 Drake J. Agric. L. 217, 221 (2003).

Information System Improve Reallocation Decisions?, 41 Nat. Resources J. 329, 330 (2001). As the Department of the Interior has recognized, "the demands for water in many basins of the West exceed the available supply even in normal years." Department of the Interior, *Water 2025: Preventing Crises and Conflict in the West* 3 (2005). Simply put, less water means there will be greater conflicts between water users and the government as it attempts to enforce the ESA.

Water scarcity in the West combined with modern pressures on water usage have strained traditional water allocation systems. "The American West is a water-scarce region, with rainfall in many areas west of the one hundredth meridian averaging less than sixteen inches per year (as contrasted to over 40 inches a year in most areas east of the Mississippi River)." C. Carter Ruml, *The Coase Theorem and Western U.S. Appropriative Water Rights*, 45 Nat. Resources J. 169, 174 (2005). Moreover, "[t]he West's population is growing at the same time that water supplies face continued and new stresses." A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth And Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies*? 27 PUB. LAND & RESOURCES L. REV. 33, 39 (2006). Between 2000 and 2003, seven of the ten fastest growing States in the country were in the West. *Id.* at 40.[4] In order to provide sufficient water for these

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[4] For example, between 1990 and 2000, the population of Nevada increased by an incredible 66.3 percent. U.S. Census Bureau, *Demographic Changes: Population Has Grown Fast in the West, Particularly in the "Public Land States," available at* http://www.doi.gov/water2025/populate.html (last visited Feb. 12, 2007). From 2000 to 2003, its growth jumped another 12.2 percent in just three years. A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth And*

burgeoning populations, cities are looking farther and paying more for water, acquiring water that would have otherwise been used for agricultural purposes. *Id.*

Another major impact on water supplies is climate change. For instance, in California even modest declines in precipitation levels "would have a significant impact because California ecosystems are conditioned to historical precipitation levels and water resources are nearly fully utilized." California Climate Change Center, *Our Changing Climate: Assessing the Risks to California* 3 (2003). Moreover, climate change could lead to higher temperatures in the Sierra Nevada Mountains, where normally water is stored as snow and ice, which as they melt slowly feed rivers and streams. Cal. Climate Change Ctr., *Scenarios of Climate Change in California: An Overview* 14 (2006). "Declining snowpack will aggravate the already overstretched water resources in California. The snowpack in the Sierra Nevada provides natural water storage, equal to about half the storage capacity in California's major human-made reservoirs . . . ." *Id.* at 15. If the snowpack were to disappear, it "could mean more water shortages in the future." *Id.* Furthermore, the "projected changes in water supply would be further exacerbated by increased demand due to warmer temperatures. By the end of century, warmer temperatures are expected to increase the crop demand between 2% and 13%." *Id.* at 16.

Given increasing demands on water resources and probable decreasing supplies, it is inevitable that water "will be more costly, and the trade-offs between growth and its

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Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies? 27 PUB. LAND & RESOURCES L. REV. 33, 40 (2006).

alternatives will become more intense and obvious." 27 Pub. Land & Resources L. Rev at 35. Although water scarcity in the American West is a major problem, water scarcity is also a global problem. As one commentator has noted of what he characterizes as the "world's freshwater crisis":

> The United Nations estimates that if current development trends continue, up to half of the people in the world will suffer from water shortages within the coming twenty-five years. Since much of the world's freshwater is contained in drainage basins that are shared by two or more states, the potential for conflict over this vital resource is obvious.

Stephen C. McCaffrey, *Peaceful Uses of International Rivers*, 97 Am. J. Int'l L. 469 (2003).

In sum, as the Department of the Interior has itself noted, in the future "water supply-related crises will affect economies and resources of national and international importance." *Water 2025* at 3. Playing into this potential future crisis is the conflict between the ESA and water users. As water becomes more scarcer, conflicts between endangered fish and water users will increase.

III. In Interpreting the Endangered Species Act, This Court Should Reaffirm the States' Continued Primacy Over Water Allocation

As this Court has observed, through the history of Western water allocation runs the consistent thread of congressional deference to state water law: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the

consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). This Court has suggested that this federal deference to state water law may have constitutional roots:

> One school of legal commentators held the view that, under the equal-footing doctrine, the Western States, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams. In 1903, for example, one leading expert on reclamation and water law observed that "[i]t has heretofore been assumed that the authority of each State in the disposal of the water-supply within its borders was unquestioned and supreme. . . ." Such commentators were not without some support from language in contemporaneous decisions of this Court. Thus, in *Kansas v. Colorado*, 206 U.S. 46 (1907), the Court noted:
>
> > While arid lands are to be found mainly, if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.
> >
> > * * *
> >
> > [W]hen the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States, and Colorado

> by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation.

California, 438 U.S. at 654–55 (citations omitted).

Whether rooted in constitutional principles or not, from the earliest days of westward expansion Congress has consistently deferred to state and territorial laws and customs regarding water allocation:

> In 1862, Congress opened the public domain to homesteading. Homestead Act of 1862, 12 Stat. 392. And in 1866, Congress for the first time expressly opened the mineral lands of the public domain to exploration and occupation by miners. Mining Act of 1866, ch. 262, 14 Stat. 251. Because of the fear that these Acts might in some way interfere with the water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law:
>
> > [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. § 9, 14 Stat. 253.
>
> * * *

> In 1877, Congress took its first step toward encouraging the reclamation and settlement of the public desert lands in the West and made it clear that such reclamation would generally follow state water law.

California, 438 U.S. at 656–57.

In 1890 and 1891, Congress passed the Act of Aug. 30, 1890, 26 Stat. 391, and the Act of Mar. 3, 1891, 26 Stat. 1101. "The apparent purpose of the 1890 and 1891 Acts was to reserve reservoir sites from settlement but to open them for use in reclamation projects. As before, Congress expressly indicated that the reclamation would be controlled by state water law. . . ." *California*, 438 U.S. at 659–60.

In 1897, Congress passed the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599. The final provision of that Act was proposed as a floor amendment by Representative Cannon "to expressly preserve State's control over reclamation within their borders. It was clearly the opinion of a majority of the Congressmen who spoke on the bill, however, that such an amendment was unnecessary except out of an excess of caution." *California*, 438 U.S. at 661.

Finally, in the Reclamation Act of 1902, Congress "set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *Id.* at 650. In establishing this "blueprint for the orderly development of the West," *Peterson v. Department of the Interior*, 899 F.2d 799, 802-03 (9th Cir. 1990), Congress continued the consistent principle of federal deference to state law: "The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675.

Rejecting the United States' claim that subsequent statutes had altered this congressional deference to state primacy in water allocation, this Court left no doubt as to the continued vitality of that principle in approving California's right to place conditions upon a water permit granted to the United States:

> The United States suggests that, even if the Congress of 1902 intended the Secretary of the Interior to comply with state law, more recent legislative enactments have subjected reclamation projects "to a variety of federal policies that leave no room for state controls on the operation of a project or on the choice of uses it will serve." Brief for United States 89. While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives. The Flood Control Act of 1944, 58 Stat. 888, for example, which first authorized the New Melones Dam, provides that it is the "policy of the Congress to recognize the interests and rights of the States in determining the development of watersheds within their borders and likewise their interests and rights in water utilization and control." Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to state-court jurisdiction for general stream adjudications:
>
> "In the arid Western States, for more

> than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> * * *
>
> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." S.Rep.No. 755, 82d Cong., 1st Sess., 3, 6 (1951).

California, 438 U.S. at 677–79 (footnotes omitted).

Thus, today each State retains the power to determine for itself the legal principles and process by which water allocations will be made. *See, e.g., United States v. Rio Grande Dam & Irrig. Co*, 174 U.S. 690, 703 (1899) ("[A]s to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise."); *Kansas v. Colorado*, 206 U.S. 46, 92 (1907) (federal legislation could not "override state laws in respect to the general subject of reclamation").

In adopting modern pollution legislation, Congress has continued to adhere to this consistent principle of State

primacy in water allocation. *See* Clean Water Act, 33 U.S.C. § 1251(g) (providing "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter"); 33 U.S.C. § 1370 (providing that nothing in the Clean Water Act should "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States"); *see also* Wilderness Act, 16 U.S.C. § 1133(d)(6) ("Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.").

Nothing in the text or the legislative history of the ESA suggests that Congress has deviated from its consistent principle of State primacy in the allocation of water. For instance, Section 4 of the ESA provides for the purchase of water to meet ESA requirements. 16 U.S.C. § 1534 (stating that "to conserve fish . . . which are listed as endangered or threatened species . . . the appropriate Secretary . . . is authorized to acquire . . . waters, or interest therein"). Such a provision would make little sense if the ESA overrode a state's allocation of water.

Moreover, Section 7 of the ESA only encompasses acts of the federal government—there is nothing in that provision that applies it to State governments. Nor should this Court so read it.

CONCLUSION

For all of these reasons, the decision by the court of appeals should be reversed.

Respectfully submitted,

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Nos. 06-340 and 06-549

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOMEBUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 7(a)(2) of the Endangered Species Act, which requires each federal agency to ensure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, constitutes an independent source of authority which overrides statutory mandates or constraints placed upon an agency's discretion by other Acts of Congress?

2. Whether a court may append additional criteria to Section 402(b) of the Clean Water Act to require that state NPDES programs include protections for endangered species?

3. Whether the Court of Appeals incorrectly concluded that the EPA's approval of Arizona's NPDES permitting program was the legal cause of any future impact to endangered species resulting from potential future private land use activities?

4. Whether the Court of Appeals correctly held that the EPA's decision to transfer NPDES permitting authority to Arizona under the Clean Water Act was based upon inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and, if so, whether the Court of Appeals should have remanded to the EPA for further proceedings without ruling on the interpretation of Section 7(a)(2)?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public-interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act ("CWA")[2] and the Endangered Species

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

[2] Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251-1387.

Act (ESA"),[3] are implemented and enforced in a manner consistent with the Constitution of the United States.

SUMMARY OF THE ARGUMENT

Congress, in enacting the CWA, expressly intended the Act to be implemented in a cooperative manner, with primary responsibility assigned to the States and with the federal government assuming an oversight and advisory role. This has been the case, with 45 states assuming primary responsibility for the issuance of permits under the National Pollution Elimination Discharge System ("NPDES"), pursuant to Section 402(b) of the CWA. In order to assume responsibility, all that a state needs do is to apply with the United States Environmental Protection Agency ("EPA") and meet nine statutorily expressed conditions; Arizona has done just that. Section 402(b) has no provision for adding a tenth condition and it expressly mandates that the EPA approve any application that meets the nine requirements. Contrary to the express language of the CWA, Respondents and the Ninth Circuit have implied a tenth condition, that is, consultation under the ESA Section 7 for each permit issued by the State. ESA Section 7, *inter alia*, requires federal agencies to consult on projects for which the federal government issues a permit; however, Section 7 does not apply to actions in which the federal government has no discretion – as such consultation would be meaningless. Moreover, ESA Section 9 provides protections for endangered and threatened species; thus, even without Section 7 consultation, endangered and

[3] Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544.

threatened species are protected. Accordingly, the Ninth Circuit erred in setting aside the EPA's non-discretionary approval of Arizona's NPDES program, as mandated by CWA Section 402(b).

ARGUMENT

On December 5, 2002, the EPA approved the State of Arizona's application to administer the NPDES program under Section 402(b) of the CWA, 33 U.S.C. § 1342(b). Section 402(b) provides that the EPA "shall approve each submitted program" unless the EPA "determines that adequate authority does not exist" for the state to administer the program in compliance with nine specified criteria. There was no dispute that Arizona's program satisfied those criteria. Instead, environmental groups contended that the EPA violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), because the EPA did not sufficiently analyze the effects of the loss of, nor require a sufficient substitute for, the consultation with the United States Fish and Wildlife Service ("FWS") that would have occurred had the EPA administered the program instead of Arizona. A majority of the Ninth Circuit panel agreed and vacated the EPA's approval of Arizona's program. The National Association of Homebuilders and the EPA (collectively "Petitioners") separately filed Petitions for *Writs* of *Certiorari* on September 6, 2006, and October 23, 2006, respectively. On January 5, 2007, the Court granted *certiorari*.

I. ESA SECTION 7(a)(2) CONSULTATION REQUIREMENTS DO NOT EXTEND TO NON-DISCRETIONARY ACTIONS MANDATED BY OTHER ACTS OF CONGRESS.

The heart of the ESA for federal actions is Section 7, which requires that every federal agency ensure that its actions are not likely to "jeopardize" a listed species or "adversely modify" its critical habitat. Section 7(a)(2) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . .

16 U.S.C. § 1536(a)(2). If, during formal consultation, it is determined that the proposed federal action will likely jeopardize a listed species or its critical habitat, the consulting agency (here the FWS) must develop a "reasonable and prudent alternative" ("RPA") that will reduce the likelihood of jeopardy. The FWS, by regulation has defined RPAs as:

> alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, *that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction*, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting

> in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02 (emphasis added). Thus, a valid RPA must be one that the action agency has the authority to implement. *Id.* Where the action agency has limited authority to modify the proposed action, a valid RPA could focus on mitigation activities that are within an agency's authority rather than on modifying the action itself. It also follows that when the action agency has no authority to modify the proposed action, no RPA could be valid. Accordingly, FWS regulations continue: "Section 7 and the requirements of this part apply to all actions in which there is *discretionary Federal* involvement or control." 50 C.F.R. § 402.03 (emphasis added). If there is no discretion to modify the proposed action, the outcome is predetermined and the need for consultation is eliminated. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) ("[W]here . . . the federal agency lacks discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species."). This conclusion has been supported by virtually every court to answer the question.

In *Strahan v. Linnon*, 967 F.Supp. 581 (D.Mass. 1997), a citizen activist brought claims against the United States Coast Guard, alleging that the Guard's activities, which included both its own vessel operations as well as its issuance of "certificates of documentation" to private whale-watching ships, were agency actions requiring compliance with Section 7(a)(2). The Guard had initiated consultation on its vessel operations but not on its issuance of certificates to the whale-watching vessels. *Id.* at 620. The court construed the regulations governing

issuance of such certificates as requiring the Coast Guard to issue them if the applicant met certain criteria. *Id.* at 621. The court ruled that Section 7 did not apply to certification because it was "nondiscretionary agency action within the meaning of the ESA." *Id.* The court framed the question as "whether Congress intended the ESA to apply to nondiscretionary, ministerial acts of federal agencies." *Id.* at 620. The court held that, if "the agency has no discretion to modify the activity at issue to accommodate the mandate of the ESA, then the consultation process would be pointless." *Id.* at 621.

In a later stage of the same litigation, the court ruled against a facial challenge to 50 C.F.R. § 402.03. The plaintiff argued that the regulation was inconsistent with the ESA because the statutory text required Section 7 compliance for "any" action authorized, funded, or carried out by an agency. The challenge was rejected because the six year statute of limitations for such facial challenges had expired, *id.* at 607; however, the court remarked that it would have rejected the challenge even if it had not been time-barred, based on the *Sierra Club v. Babbitt* court's reading of 50 C.F.R. § 402.03 and the deference courts give to agency interpretations of statutes. *Id.* The court reaffirmed its reasoning that consultation is meaningless where an agency lacks discretion to modify its actions to accommodate the ESA. *Id.*

In 2003, the District Court for the District of Columbia addressed a variation on this issue within the context of Colorado River management. In *Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53, 67-69 (D.D.C. 2003), the court considered whether the Bureau of Reclamation, which operated various water storage and delivery projects on the river, was required to consult on the impact of its

operations on listed species that lived downstream in Mexico. *Id.* at 59-62. The Bureau had consulted previously on such impacts, but after coming to the conclusion that it had no control over conditions in Mexico, it declined to continue consulting on its operations as they affected those species. *Id.* Acknowledging that the Bureau's operations were having demonstrable impacts on downstream species in Mexico, the court nonetheless ruled that the ESA did not apply to the Bureau's actions. *Id.* at 63-64.

The *Defenders of Wildlife v. Norton* opinion was grounded in an extensive body of law, including international treaties, Supreme Court precedent, numerous binding contracts and federal statutes, that effectively left the Bureau with no discretion whatsoever in how it managed water in the Colorado River. "The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico." *Id.* at 67-68. In other words, while the Bureau's activities were harming the downstream listed species, there did not appear to be anything the agency could do about it. Hence, the court concluded, Section 7 did not apply. The court appeared to wrestle with the question, noting that the outcome in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), "somewhat counsels against" holding 50 C.F.R. § 402.03 as limiting the Bureau's ESA duties in this situation. *Id.* at 67. However, in the end it found that consultation was not required because it was "unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one." *Id.* at 69.

The Western District of Washington handed down the most recent ruling on this issue. In *National Wildlife Federation v. Federal Emergency Management Agency*, 345

F.Supp.2d 1151 (W.D.Wash. 2004) ("*NWF v. FEMA*"), the court considered FEMA's implementation of a floodplain management program that purportedly threatened Chinook salmon in Puget Sound. *Id.* at 1168-75. The *NWF v. FEMA* court, relying on Ninth Circuit precedent, turned to the enabling statute, the National Floodplain Insurance Program ("NFIP"), to determine whether there was discretion to trigger Section 7. With respect to the actual provision of flood insurance, the court concluded that: "FEMA has no discretion to deny flood insurance to a person in a NFIP-eligible community. . . . As a result, FEMA has no obligation to consult with [the National Marine Fisheries Service] regarding the actual sale of flood insurance." *Id.* at 1174; *contra Florida Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D.Fla. 1994) (holding that, even if the proposed actions were non-discretionary, FEMA was required to consult under ESA Section 7.).[4]

As the above-discussed cases show, nowhere is it clearer that Section 7 does not apply to non-discretionary actions than when the federal agency is acting under the direct mandate of Congress. Such is the case with EPA's

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[4] In addition to the cases analyzed in depth above, many other courts have utilized agency discretion as a key element necessary to require Section 7 consultation. *See, e.g., California Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n*, 472 F.3d 593 (9th Cir. 2006); *W. Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006); *In re Operation of the Missouri River System*, 421 F.3d 618 (8th Cir. 2005); *Ground Zero Center for Non-violent Action v. United States Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003); *Karuk Tribe of California v. United States Forest Serv.*, 379 F.Supp.2d 1071 (N.D.Cal. 2005).

approval of a state's NPDES permitting program under CWA Section 402(b).

II. THE CLEAN WATER ACT DOES NOT PROVIDE SPECIFICALLY FOR THE CONSERVATION OF UPLAND THREATENED AND ENDANGERED SPECIES.

A. The NPDES Program Was Designed To Promote Clean Water, Not Necessarily To Conserve Terrestrial Species.

Section 301 of the CWA establishes a broad prohibition against the "discharge of any pollutant by any person" except when in compliance with the CWA's permit requirements, effluent limitations, and other enumerated provisions. 33 U.S.C. § 1311(a). The NPDES permit program implements Section 301's prohibition on unauthorized discharges by requiring a permit for every discharge of pollutants from a point source into waters of the United States. *Id.* § 1342. A NPDES permit is issued by either the EPA or by a state if the state has received permitting authority from the EPA pursuant to Section 402(b). *Id.* § 1342(b).

The primary purpose of a NPDES permit is to establish enforceable (*i.e.*, measurable) effluent limitations. ENVIRONMENTAL LAW HANDBOOK § 6.5 (17th Ed.; Thomas F.P. Sullivan, Ed.). The CWA mandates a two-part approach to establishing effluent limitations: technology-based limitations and water quality-based limitations. *See, e.g.*, 33 U.S.C. §§ 1311(b), 1313, 1316, 1317. But, under either approach, the NPDES permit establishes a maximum numeric standard that may not be exceeded by the permit holder.

In addition to numerical effluent limitations, the permit may establish a number of other enforceable conditions, such as monitoring and reporting requirements, a duty to properly operate and maintain systems, as well as record keeping, inspection, and entry requirements; however, each of these additional conditions is grounded in the discharge system or monitoring system. 40 C.F.R. § 122.41. Thus, the primary purpose of the NPDES program is to limit total system-wide discharges of pollutants to a set level. While non-aquatic and upland species of plants and wildlife undoubtedly benefit from a cleaner environment, these benefits are simply collateral to the primary mission of the NPDES program. To attempt to stretch the reach of the NPDES program to regulate land use in areas far removed from the water body in which a storm drain discharges is not supported by the policy of the CWA.

B. The NPDES Program Was Developed Specifically To Incorporate Cooperative Federalism.

The CWA anticipates a partnership between the States and the Federal Government, driven by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In fact, Section 101 of the CWA declares:

> It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

Id. § 1251(b) (emphasis added). Toward this end, Section 402 establishes the NPDES permitting regime, and describes two types of permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program administered by the EPA.

Section 402(b) authorizes each State to establish "its own permit program for discharges into navigable waters within its jurisdiction." *Id.* § 1342(b). While an authorized state administers the NPDES program, the EPA retains the authority to block the issuance of any state-issued permit that is outside the guidelines and requirements of the Act. *Id.* § 1342(d)(2). Moreover, the language chosen reflects Congress's intent that primary responsibility under the CWA be with the States: "The permit program of the [EPA] . . . and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a *State permit program* and permits issued thereunder under [Section 402(b)]." 33 U.S.C. § 1342(a)(3) (emphasis added); *see also Natural Res. Defense Council, Inc. v. Envtl. Prot. Agency*, 859 F.2d 156, 173 (D.C.Cir. 1988) ("Congress repeatedly articulated its expectation that the states would play a major role in administering [the NPDES program]").

This cooperative federalist structure has been overwhelmingly successful, with 45 states administering state NPDES programs. However, this successful program is put at risk if the majority opinion of the Ninth Circuit is allowed to stand. As the dissent, in response to the Ninth Circuit's denial of a rehearing *en banc*, notes:

> If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but every categorical mandate

> applicable to every federal agency. We should be particularly chary of holding that the ESA made such sweeping changes when the agency charged with implementing the statute has adopted a regulation allowing the ESA to coexist peacefully with all categorical mandates. *See* 50 C.F.R. § 402.03. There is no justification for nullifying countless congressional directives by casting aside the agency's authoritative interpretation of the ESA, formally adopted pursuant to notice and comment procedures.

Defenders of Wildlife v. United States Envtl. Prot. Agency, 450 F.3d 394, 399 n.4 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing *en banc*).

C. The CWA Provides Nine Criteria That States Must Meet To Administer The NPDES Program; There Is No Provision To Add A Tenth Criterion.

Section 402(b) of the CWA provides:

> [T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

33 U.S.C. § 1342(b). Moreover, the EPA must approve the state NPDES program if the program satisfies nine enumerated criteria. *Id.* ("The Administrator *shall* approve each such submitted program unless he determines that" the program does not satisfy the criteria listed.) (emphasis added); *id.* § 1342(b)(1)-(9) (listing the criteria). Section 402(b) does not provide for the inclusion of any additional criteria or the consideration of any other factor. *Id.* § 1342(b); *Am. Forest & Paper Ass'n v. United States Envtl. Prot. Agency*, 137 F.3d 291 (5th Cir. 1998) (holding the EPA may not impose additional criteria beyond those expressly provided in Section 402(b)). Moreover, it is undisputed that the nine criteria were met in this case; therefore, the EPA was required to approve Arizona's assumption of the NPDES program.

III. ALTHOUGH ESA SECTION 7(a)(2) CONSULTATION REQUIREMENTS DO NOT APPLY TO STATE NPDES PERMITTING PROGRAMS, ESA SECTION 9 PROVIDES AMPLE PROTECTIONS TO THREATENED AND ENDANGERED SPECIES.

While ESA Section 7(a)(2)'s consultation requirements do not apply to state NPDES permitting decision, it does not necessarily follow that an entire population of threatened and endangered species will be extirpated. ESA Section 9 sets forth two separate sets of prohibitions, one applicable to listed fish and wildlife, and the other to listed plants. 16 U.S.C. § 1538. For fish and wildlife, Section 9 makes it unlawful for any person subject to the jurisdiction of the United States to "take"[5] any listed species

[5] Section 3 defines take as: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any

(Continued on following page)

within the United States or its territorial seas, or upon the high seas. *Id.* § 1538(a)(1). With respect to listed plant species, Section 9 makes it unlawful for any person subject to the jurisdiction of the United States to maliciously damage or destroy any listed plant, or remove any listed plant from federal lands. *Id.* § 1538(a)(2). Thus, listed species are protected against unlawful acts by the plain language of Section 9 and its implementing regulations; in fact, any person who violates these laws may be subject to criminal penalties, not just civil fines. *Id.* § 1540.

The ESA provides for few exceptions to the statutory hammer of Section 9; however, a permit holder may avoid liability for "incidental" takes of listed species so long as he engages in consultation with the FWS and follows any RPA's provided. Two mechanisms are available to the permit holder, Section 7 and Section 10. *Id.* §§ 1536, 1539. Under ESA Section 7(a)(3), a permit holder may request the action agency to enter into consultation with the FWS if he has reason to believe that a listed species may be present in the area affected by his project and that implementation of the project will likely affect the species. *Id.* § 1536(a)(3). Under ESA Section 10, the FWS may exempt projects that may impact listed species so long as any taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. *Id.* § 1539(a)(1)(B). Once initiated, consultation under either option proceeds in the same manner as if it were initiated by the federal

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such conduct." 16 U.S.C. § 1532(18). Further, "harm" in the definition of "take" means: an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

agency under Section 7(a)(2), except that, under Section 10, the applicant must provide the FWS a detailed, and often costly, conservation plan. *Id.* §§ 1536(a), 1539(a)(1)-(2).

The majority panel of the Ninth Circuit cited, as an additional reason for setting aside the EPA's authorization of Arizona's NPDES program, its opinion that "there is no indication that section 9 is or will be enforced meaningfully." *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946, 975 (9th Cir. 2005). However, the panel's unfounded opinion that the FWS will not enforce its congressionally-mandated duties may not stand as a reason to set aside an agency's decision, especially in an administrative record case where the agency is assumed to be conducting itself in accordance with the law. America's system of administrative law, and the deference provided to the agencies charged with administering the laws of the United States, is founded on this concept. Moreover, courts should assume that people will follow the law, and in this case, not destroy or harm listed species. Thus, absent any showing that the FWS will not perform its statutorily-mandated functions, the Ninth Circuit exceeded its bounds by relying on its own unsubstantiated belief that Section 9 would not provide a meaningful deterrent to the taking of listed species.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court overturn the decision of the Ninth Circuit and hold that the EPA's transfer of NPDES permitting to the State of Arizona was in accordance with both the Clean Water Act and the Endangered Species Act.

Respectfully submitted,

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In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE *AMICUS*

Amicus curiae the National Association of Clean Water Agencies ("NACWA") represents the nation's publicly-owned wastewater treatment works ("POTW") agencies. NACWA's nearly 300 member agencies collect, treat and reclaim over 18 billion gallons per day of wastewater to provide most of the U.S. population with reliable sewer service. NACWA members are directly affected by regulatory decisions made under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA"). These members operate their POTWs pursuant to National Pollution Discharge Elimination System ("NPDES") permits, most of which were issued by states approved by the United States Environmental Protection Agency ("EPA") pursuant to Section 402(b) of the CWA. NACWA's members exist to provide effective wastewater treatment and to promote water quality. They are committed to protecting the integrity of the CWA. NACWA's interest in this case is in avoiding the improper extension of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* ("ESA") to impede administration of the CWA. It takes no position on any other aspect of EPA's approval of Arizona's NPDES program, including the

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[1] Pursuant to Rule 37.6 of this Court, *Amicus* represent that counsel for *Amicus* authored this brief in its entirety and that no person or entity other than *Amicus* and their representatives made any monetary contribution to the preparation or submission of this brief.

additional question on which the Court requested briefing by the parties.[2]

STATEMENT OF THE CASE

NACWA adopts the statement of the case contained in the United States Environmental Protection Agency's *Petition for Writ of Certiorari* ("EPA Petition") filed in this proceeding, except insofar as the EPA Petition suggests that EPA transfers NPDES permit authority to a State. Rather than a transfer by EPA, *see* EPA Pet. For Cert. at 2-8, CWA Section 402(b) provides for assumption of that authority by the States.

SUMMARY OF ARGUMENT

The plain text of Section 402(b), as well as the structure of the CWA as a whole and its legislative history, demonstrates that: (1) EPA may consider only the factors listed in Section 402(b) when it decides whether to approve a State's NPDES program; and (2) only if EPA determines that a proposed State NPDES program does not meet the statutory requirements may the Agency disapprove the program, regardless of the requirements of other Federal statutes. Furthermore, EPA's own regulations make it clear that the ESA has no role in its review of State NPDES programs submitted for approval. EPA would have avoided much confusion in this case if it had heeded the statute and its own regulations.

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[2] Each of the parties to this case has previously filed its consent to NACWA's filing of this brief, with the exception of the Solicitor General. NACWA is filing the Solicitor General's consent with this brief.

ARGUMENT

I. CONGRESS HAS DIRECTLY SPOKEN TO APPROVAL CRITERIA FOR STATE NPDES PROGRAMS

In the Federal Water Pollution Control Act Amendments of 1972, which first enacted Section 402, Congress demanded swift action to improve and protect the Nation's waters. Pub. L. No. 92-500, 86 Stat. 816 (1972). It prescribed a new federal-state relationship to achieve this objective, and it set forth the terms on which that relationship would proceed. EPA's ultimate conclusion that potential ESA effects were not germane to its evaluation of the Arizona NPDES program is consistent with Congress's intent embodied in the plain language of Section 402(b), as well as the structure of the CWA as a whole, and its legislative history. As this Court has instructed:

> If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n.9 (1984) ("*Chevron*"). The decision by the court below, *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), forgot this principle.

A. CWA SECTION 402(B) LIMITS EPA'S DISCRETION TO DISAPPROVE STATE NPDES PROGRAMS

Both the text of the CWA and its legislative history reflect Congress's determination to restore and maintain the

"chemical, physical and biological integrity of the Nation's Waters" as quickly as possible. 33 U.S.C. § 1251(a). To that end, it provided for a Federal-State partnership, in which the States would operate EPA-approved NPDES permit programs. CWA Section 402(b) instructs the EPA Administrator to approve each State program submitted, unless he determines that it is deficient on specific grounds:

> The Administrator *shall approve* each submitted program unless he determines that adequate [State] authority does not exist . . ..

33 U.S.C. § 1342(b) (emphasis added). The Act then goes on to list precise and exclusive criteria that constitute "adequate authority." They are limited to nine essential elements of sufficient permit program powers: the power to issue revocable permits for five-year terms, *id.* § 402(b)(1); to apply effluent limitations and related water quality requirements in those permits, *id.*; to enter and inspect regulated premises, *id.* § 402(b)(2)(B) ; to give notice of applications to the public, affected states and the Administrator, *id.* §§ 402(b)(3), (4), (5); to enforce compliance and assess penalties for violation, *id.* § 402(b)(7); and the power to impose pretreatment requirements on POTWs, *id.* §§ 402(b)(8), (9). There is no criterion relating to the power of the State to advance other cherished Federal policies and programs, such as the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*; the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq.* ("NEPA"); the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*; the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*; or, for that matter, the ESA. While the 1973 ESA was not yet adopted when Section 402(b) was first enacted, Congress has since amended the CWA no fewer than nine times, *see* 33 U.S.C. § 1251 note (2000 & Supp. IV 2004), and it has never seen fit to add any reference to the

ESA in Section 402(b). As the Fifth Circuit recognized almost a decade ago:

> There is no hint that Congress intended to grant EPA authority to erect additional hurdles to the permitting process beyond those expressly noted in [Section 402(b)].

American Forest & Paper Ass'n v. EPA, 137 F.3d 291, 298 (5th Cir. 1998). To the contrary, EPA's addition of extraneous criteria to those set by Congress would have threatened the congressional goal of implementation of the NPDES program without interference.

B. Congress Demanded Implementation Without Interference

Congress included several provisions in the CWA to ensure that its "restore and maintain" goals could be achieved efficiently and swiftly. It set tight timetables for EPA to issue regulations prescribing effluent limitations and standards, *see, e.g.*, CWA §§ 304(b), 306, 33 U.S.C. §§ 1314(b), 1316, and it provided for prompt and preclusive judicial review of those regulations in Section 509(b). 33 U.S.C. § 1369(b). As the First Circuit noted in *Narragansett Electric Co. v. EPA*;

> The short time frame in § 1369(b) clearly reflects some effort to protect EPA's interests in finality in certain matters . . ..

407 F.3d 1, 5 (1st Cir. 2005).

Congress also contemplated that EPA would complete its review of state NPDES programs submitted for approval within 90 days. CWA Section 402(c) requires the EPA Administrator to suspend the issuance of Federal NPDES

permits within 90 days of the date that a State submits a complete NPDES program for approval, unless he finds that the state's submission does not meet the criteria of Section 402(b). CWA § 402(c), 33 U.S.C. § 1342(c). Without an EPA decision within that ninety-day review window, Section 402(c) would have left the role of permit issuer vacant. In the absence of a decision, EPA's authority would have been suspended by operation of the statute, and the State's would still be inchoate pending approval.[3]

Similarly, most of the actions taken by EPA pursuant to its CWA authority were exempt from the requirements of the NEPA by CWA Section 511(c). 33 U.S.C. § 1371(c). As the bill's principal sponsor explained during Senate consideration of the Conference Report:

> The purpose of [the Clean Water Act] is to set rapidly in motion an effective water pollution control program. The Act sets tight time limits within which the Administrator must take a multitude of actions, each heavily dependent on the other, that will, in the aggregate, produce a meaningful, effective, and truly workable program as quickly as possible. *Should the Administrator find himself confronted with substantive or procedural requirements extraneous to this Act, the very program that the Act seeks to establish would be imperiled.*

Congressional Research Service, 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, No. 93-1, at 182 (1973) (extended remarks of Sen. Muskie regarding consideration of the Conference Report) (emphasis added) [hereinafter 1972 FWPCA

[3] EPA's implementing regulations at 40 C.F.R. § 123.1(d) make the suspension effective only upon its approval of a State program, rather than within ninety days of the State's submission.

Legis. Hist.]. Indeed, Congress specifically intended that EPA's actions under the CWA would proceed swiftly, and without interference from other federal programs, in order to ensure meaningful progress against water pollution.

C. CONGRESS CHOSE TO GIVE THE STATES THE PRIMARY ROLE IN THE NPDES PERMIT PROGRAM

To achieve the goals of the CWA, Congress chose to give the States primary responsibility for the NPDES program. The text of CWA Section 101(b) declares the policy of Congress with respect to the role of the States:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution . . .. It is the policy of Congress that the *States* . . . implement the permit programs under [Section 402].

33 U.S.C. § 1251(b) (emphasis added). The standards Congress set for the States to assume that responsibility have remained largely unchanged for the past 35 years.

It was necessary to enlist the resources of the States to meet the "tight time limits" to which Sen. Muskie referred, especially to complete issuance of NPDES permits. These permits were the key to apply effluent limitations to point sources, and Congress expected them to be issued for up to an estimated 300,000 industrial point sources and an untold number of other discharges by December 31, 1974, a bare 26 months after enactment. *Compare* 2 1972 FWPCA Legis. Hist. at 1257 (statement of Sen. Muskie regarding S. 2770) *with* 33 U.S.C. §§ 1342(k) & 1371(b). It gave point sources a permit grace period until that time, provided they had

applied for an NPDES permit. *See* CWA 402(k), 33 U.S.C. § 1342(k). Congress knew that such a monumental task of implementation demanded the active participation and involvement of the States. *See, e.g.*, S. Rep. No. 92-414, at 71 (1971) (regarding S. 2770), *reprinted in* 1 1972 FWPCA Legis. Hist. at 1489. ("It is expected that the States will play a major role in the administration of this program."); *id.* at 72, 1490 ("A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program."); H.R. Rep. No. 92-911, at 127 (1972), *reprinted in* 1 1972 FWPCA Legis. Hist. at 814 ("The states . . . stressed the need to put the maximum responsibility for the permit program in the states. . . . [T]he states ought to have the opportunity to assume the responsibilities that they have requested.").

Congress was aware that its preference for state implementation meant that the panoply of Federal laws, Executive Orders, and regulations that might apply to Federal issuance of permits would not apply to the State programs. Perhaps Congress preferred to give the States the flexibility, within prescribed bounds, to experiment, to innovate, to pursue the diversity that is the hallmark of our federal system. To that end, for instance, it specifically preserved the authority of the states to adopt and enforce standards and requirements more stringent than required under the Federal Act. *See* CWA § 510, 33 U.S.C. § 1370; *see also* CWA §§ 401(a), (d), 33 U.S.C. § 1341(a), (d) (providing a means for states to impose "any other appropriate requirement of State law" as conditions in federal permits and licenses). *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711 (1994). And at no point has it sought to encumber – or to allow EPA to encumber – the Section 402(b) approval process with any concerns extraneous to the CWA.

The flexibility to forge creative approaches has also fostered innovative local programs to protect endangered species. For instance, the Sonoran Desert Conservation Plan – a joint effort of Pima County, Arizona, the U.S. Fish and Wildlife Service, and the State of Arizona – is one of the nation's most comprehensive conservation and urban planning efforts. It provides short-term actions and long-term strategies to protect endangered species and their habitats in this rapidly growing portion of the State. As part of this effort, Pima County voters approved a $174.3 million bond issue to acquire and protect critical habitats, and roughly 77,000 acres have been placed in protective reserves.[4] Similarly, the King County, Washington Wastewater Treatment Division and the San Francisco Public Utilities Commission have begun their own Habitat Conservation Planning studies and processes.[5] In Florida, Collier County also recently initiated a Habitat Conservation Plan that manages growth to protect endangered species, especially the Red-Cockaded Woodpecker, and Broward County sponsors the NatureScape Broward program to encourage native drought-tolerant landscape designs that conserve water, protect water quality, and create and preserve wildlife habitat.[6] These programs illustrate steps local government are taking as part of their commitments to environmental stewardship.

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[4] *See generally* Pima County Board of Supervisors, Pima County Multi-Species Conservation Plan (2006); *See* Pima County Board of Supervisors, Sonoran Desert Conservation Plan Update (2006).

[5] *See* King County Wastewater Treatment Division, *Habitat Conservation Plan*, at http://dnr.metrokc.gov/wtd/hcp/index.htm (Aug. 23, 2006); San Francisco Public Utilities Commission, Res. No. 00-0229.

[6] *See* Collier County, Florida, Res. Nos. 2005-174 & 2006-41; Broward County, Florida, NatureScape Broward – Between Sawgrass and Seagrass, at http://www.broward.org/naturescape/ (last visited Feb. 19, 2007).

II. BOTH NPDES AND ESA REGULATIONS PRECLUDED EPA FROM CONSIDERING THE ESA

A. EPA'S NPDES RULES PREVENT THE AGENCY FROM INJECTING ESA CONCERNS INTO CWA SECTION 402(B) APPROVALS

EPA's regulations regarding the required content of state NPDES programs allow the Agency to consider only the criteria contained in CWA Section 402(b) when evaluating requests to approve such programs. *Compare* 33 U.S.C. § 1342(b) *with* 40 C.F.R. § 122.49 & 40 C.F.R. § 123.25. It is a fundamental rule of administrative law that an agency must abide by its own regulations. *See Fort Stewart Schools v. FLRA*, 495 U.S. 641, 654 (1990); *accord, United States v. Nixon*, 418 U.S. 683, 696 (1974) (stating so long as a regulation remains in force, the Executive Branch is bound by it). The Second Circuit has recently invoked this principle in reviewing another aspect of EPA's NPDES program. See *RiverKeeper, Inc. v. EPA*, No. 04-6692-(ag)(L), slip op. at 55 (2d Cir. Jan. 25, 2007), *available at* 2007 WL 184658 (2d Cir. 2007) ("It is axiomatic that an administrative agency is bound by its own regulations") (internal citation omitted). EPA would have been wise to have heeded that axiom here. Because it did not, a refresher on those regulations is in order.

EPA's interim NPDES permit program under Section 402(a), 33 U.S.C. § 1342(a), is governed by its regulations at 40 C.F.R. Part 122. Other federal laws that may be applicable to permit-issuance decisions by EPA as a federal

agency are listed in Section 122.49. These include laws relating to protection of scenic rivers, historical values, endangered species, and the coastal zone; to consultation with state wildlife resource agencies; and in certain instances to broad consideration of environmental impacts. *See id.* It is here in Section 122.49 that EPA's regulations make the ESA specifically applicable to EPA decisions on permits. *Id.* § 122.49(c).

EPA regulations at 40 C.F.R. Part 123 in turn set forth the requirements State programs must meet to obtain approval. As EPA explains there:

> This part specifies the procedures EPA will follow in approving, revising and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318 [aquaculture], 402, and 405(a) [sludge disposal] (National Pollutant Discharge Elimination System–NPDES) of the CWA.

40 C.F.R. § 123.1(a). EPA then commits itself to approve those State programs that meet the requirements of Part 123:

> The Administrator will approve State programs which conform to the applicable requirements of this part.

Id. § 123.1(c). The rule then specifies the applicable requirements, in pertinent part, by incorporating selected portions of those applicable to EPA's own permit program, as set forth in various sections of Part 122. When EPA then sets forth more specifically in 40 C.F.R. § 123.25(a) the catalogue of mandatory program elements that States must incorporate to gain approval, it omits entirely any reference to Section 122.49 or the Endangered Species Act. *See* 40

C.F.R. § 123.25(a). This omission is consistent with the statute.

In addition, a comparison of the text of 40 C.F.R. § 122.49 as originally proposed, versus its final form, evinces EPA's recognition that the requirements of other federal environmental statutes are not appropriate grounds for NPDES permit requirements under the CWA. As proposed, Section 122.49 would have required all NPDES permits to reflect applicable requirements from other federal environmental laws. *See* 43 Fed. Reg. 37,078, 37,102 (Aug. 21, 1978). The final version of this provision, however, deleted the requirement for NPDES permits to include such obligations. *See* 40 C.F.R. § 122.49. Instead, even where EPA is the permit agency, Section 122.49 stands only as a reminder of the other Federal statutes that may be independently applicable to the same activity being permitted.

The NPDES rule's omission of the ESA from State program requirements is consistent with a joint discussion by EPA, FWS, and NMFS of the Fifth Circuit's opinion in *American Forest & Paper Ass'n v. EPA*. In the preamble to their final 2001 Memorandum of Agreement (the "MOA"), those agencies agreed that the MOA would not impermissibly interpose ESA requirements into EPA's CWA analyses because EPA's consultation with FWS and NMFS "simply ensures that EPA has the full benefit of the Services' views on potential impacts to Federally listed species . . . *in determining whether CWA requirements are met.*" 66 Fed. Reg. 11,202, 11,206 (Feb. 22, 2001) (emphasis added). And it is the CWA requirements, not those of the ESA, that govern EPA's decision under its own binding NPDES regulations.

Limiting EPA's analysis of State NPDES programs submitted for approval to the four corners of CWA Section

402(b) and its implementing regulations provides the Agency with definite rules of decision to use while implementing the Act. Perhaps more importantly, faithful adherence to the statute and EPA's implementing regulations provides States seeking to operate their own NPDES program with certainty as to the requirements for such a program.

B. ESA Regulations Instructed EPA Not To Consider the ESA

EPA would also have been well-advised to follow the ESA regulations reflecting the interpretation of the ESA by the agencies charged with its implementation. As explained in the EPA Petition and that of the National Association of Home Builders, the regulations promulgated by the agencies charged with administering the ESA provide that:

> Section 7 [of the ESA] and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.

50 C.F.R. § 402.03 (emphasis added); EPA Pet. For Cert. at 18; National Association of Home Builders Pet. for Cert. at 20-21. Thus, where a Federal agency has no discretion regarding a particular action, FWS and NMFS have concluded that Section 7 and the related regulations do not apply. As the EPA Petition points out, any ESA consequence of Arizona's assumption of NPDES authority was the effect of congressional mandate, not of Agency action. EPA Pet. for Cert. at 17. Under the ESA regulation, any such effect was not "caused" by EPA's approval. *Id.*; *see* 50 C.F.R. § 402.02. EPA had no choice but to approve. Because FWS and NMFS's interpretation is a permissible reading of ESA Section 7(a), 16 U.S.C. § 1536(a), it is entitled to *Chevron* deference. *See* 467 U.S. at 842-43.

CONCLUSION

For the foregoing reasons, NACWA urges the Court to vacate the decision of the United States Court of Appeals for the Ninth Circuit with respect to the necessity for EPA to consider ESA effects in CWA § 402(b) decisions.

Respectfully submitted,

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STATUTORY APPENDIX

CWA Section 402(c), 33 U.S.C. § 1342(c)
(2000 & Supp. IV 2004).

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals.--A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

Nos. 06-340, 06-549

IN THE

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Petitioners,

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QUESTION PRESENTED

In this brief, *Amici* respond solely to the following question presented by Petitioner Environmental Protection Agency:

Whether § 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

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INTERESTS OF *AMICI CURIAE* [1]

This brief solely addresses the Ninth Circuit holding that the Endangered Species Act ("ESA") includes an affirmative

[1] Pursuant to Rule 37.6, the Hydroelectric Group states that no counsel for another party authored this brief, and that only Hydroelectric Group members made monetary contributions to its preparation and submission.

grant of authority to an action agency to disregard other statutory limitations, and that the nature of the agency action—whether it is discretionary or not—is not altogether significant. The Ninth Circuit decision creates the potential for unnecessary and irreconcilable conflicts between the ESA and other statutes. These conflicts could disrupt or interfere with the Nation's electrical energy supply. To prevent potential conflicts between the ESA and Federal Power Act ("FPA"), the *Amici* submit this brief in support of the Petitioners.

A. The *Amici* Represent Interests of the United States' Hydroelectric Industry.[2]

The National Hydropower Association ("NHA"); American Public Power Association ("APPA"); Northwest Hydroelectric Association ("NWHA"); City of Tacoma, Washington ("Tacoma"); Public Utility District No. 1 of Chelan County, Washington ("Chelan"); Public Utility District No. 1 of Douglas County, Washington ("Douglas"); Public Utility District of Grant County, Washington ("Grant"); PacifiCorp; and United Water Conservation District ("UWCD") (collectively referred to as "the Hydroelectric Group") represent interests of the United States' hydroelectric industry.

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[2] Consent by all of the parties has been given to the Hydroelectric Group for filing this brief. Petitioners National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association; Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller; and the State of Arizona have submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The U.S. Environmental Protection Agency ("EPA") has provided written consent to the Hydroelectric Group to file this brief. The Hydroelectric Group submitted EPA's consent letter to the Court concurrent with its filing of this brief.

NHA is a national association representing the interests of the United States' hydroelectric industry. NHA represents sixty-one percent of domestic, non-federal hydroelectric capacity, constituting almost 80,000 megawatts ("MW"), across North America. NHA's 140 members include community-owned utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys from all regions of the country.

APPA is a national organization representing the interests of more than 2,000 community-owned electric utilities throughout the United States that deliver electric energy to approximately forty-three million citizens. Hydroelectric projects comprise over twenty-one percent of public power's total generation.

NWHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has 84 members from all segments of the industry.

Tacoma, Chelan, Douglas and Grant are municipal corporations chartered under the laws of the State of Washington. They own and operate municipal electric utility systems that engage in the generation, transmission, and distribution of electric power and energy in the State of Washington. They also purchase and sell electric energy and power at wholesale and retail.

Tacoma owns and operates four hydroelectric projects with a total generating capacity of 719 MW. Eighty-seven percent of the electricity Tacoma produces or purchases for its customers is produced from hydroelectric projects.

Chelan owns and operates three hydroelectric projects with a total generating capacity of 2,000 MW, providing electricity to its customers and selling approximately sixty-three percent of the total generating capacity of these facilities to other wholesale purchasers throughout the Pacific Northwest.

Douglas owns and operates the Wells Hydroelectric Project, an 840 MW facility located on the Columbia River, and sells approximately seventy percent of the total generating capacity of this facility under long-term power sales contracts to one public utility district, four Pacific Northwest investor-owned utilities and one Indian tribe.

Grant owns and operates four hydroelectric projects with a total generating capacity of over 2,000 MW, providing electricity to its customers and selling over sixty percent of the total generating capacity of these facilities to other wholesale purchasers throughout the Pacific Northwest.

PacifiCorp is a regulated electric company serving retail customers in portions of the states of Utah, Oregon, Wyoming, Washington, Idaho and California. It delivers electricity to customers in Utah, Wyoming and Idaho as Rocky Mountain Power and to customers in Oregon, Washington and California as Pacific Power. PacifiCorp owns and operates 50 hydroelectric plants and serves as the operator for two additional hydroelectric projects. PacifiCorp's hydroelectric projects have an installed capacity of about 1,073 MW, which represents nearly 11 percent of the company's annual power generation.

UWCD is a public Special District under the laws of the State of California. UWCD owns and operates facilities, and manages programs, for the recharge of groundwater supplies in the highly productive but overdrawn aquifers in central Ventura County, California. These aquifers support a population that exceeds 350,000 and an agricultural economy of approximately $1.5 billion per year. The water supplies for UWCD's groundwater recharge activities originate from storage and diversion projects in the Santa Clara River watershed. Some of these projects have federal involvement, including the Santa Felicia Project, which co-generates electrical energy from flows otherwise discharged for water resource management purposes. Up to 2.4 MW of electricity is generated

under a Federal Energy Regulatory Commission ("FERC") license and sold entirely to the Southern California Edison Company.[3]

Together, NHA, APPA, NWHA, Tacoma, Chelan, Douglas, Grant, PacifiCorp, and UWCD generate a significant percentage of all electricity in the United States, and a significant portion of the non-federally generated electric power in the Northwest. Hydroelectric projects are an important source of this energy, accounting for nearly ten percent of national electric production each year and more than eighty percent of national renewable energy. The nation's hydroelectric projects also provide numerous other benefits to the communities in which they are located, such as municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat.

B. The Impact of the Ninth Circuit's Decision on the Hydroelectric Group.

Almost all non-federally-owned hydroelectric projects are subject to the FPA's comprehensive regulatory scheme. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) in order "to secure a comprehensive development of national resources. . . ." *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric

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[3] Other projects include the Freeman Diversion Project, which does not generate electrical energy but was constructed under a loan from the U.S. Bureau of Reclamation ("BOR"), and other river management programs for which U.S. Army Corps of Engineers ("Army Corps") Clean Water Act ("CWA") § 404 permits are sought. Because of the extensive federal involvement in these projects, they also may be impacted by the Ninth Circuit decision, but differently than the UWCD FERC-licensed hydroelectric projects.

projects.[4] *See* 16 U.S.C. §§ 797(e), 803(a)(1), 808, and 817(b). In carrying out its statutory responsibilities, FERC is required to consider all the factors affecting the public interest in the comprehensive development of a waterway, including appropriate conditions to protect the environment.[5] *Id.* §§ 797(e), 803(a)(1).

To encourage and attract the enormous amount of capital required to develop hydroelectricity, Congress included safeguards in the FPA to help ensure positive returns on investments. For example, FPA § 15 requires that licenses be issued on reasonable terms. 16 U.S.C. § 808(a)(1). Under FPA § 6, FERC is authorized to issue licenses with terms of up to fifty years and is prohibited from amending licenses, once they are accepted, without the consent of the licensee. 16 U.S.C. § 799; *Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). Although many new licenses contain reopeners and/or adaptive management provisions, FPA § 28 restricts the authority to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

Because of the complexities of the FERC relicensing process, the processing time—i.e. the time from license application to FERC's issuance of the license—is substantial, averaging fifty-two months, with many projects taking much

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[4] Federally operated projects, such as those operated by the Tennessee Valley Authority, the Bonneville Power Administration, the Army Corps, and BOR are not licensed by FERC.

[5] In addition to the FPA, hydroelectric projects are now subject to the requirements of a variety of environmental statutes, such as the National Environmental Policy Act ("NEPA"), the CWA, the Fish and Wildlife Coordination Act, the Federal Land Policy and Management Act, and the National Historic Preservation Act. This includes being subject to the requirements of § 7 of the ESA.

longer.[6] This results in a very large number of existing FERC licenses expiring prior to the completion of the FERC relicensing process.

Under FPA § 15, if, by the expiration of an existing license, FERC does not issue a new license for the project or does not otherwise achieve a federal takeover of the project, "the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid." 16 U.S.C. § 808(a)(1). In addition, FERC's regulations provide, in part, that "[t]he Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license. . . . ", and further that "[a]n annual license issued under this section will be considered renewed automatically without further order of the Commission, unless the Commission orders otherwise." 18 C.F.R. § 16.18(b), (c).

There are approximately 2,500 hydroelectric projects across the country subject to FERC relicensing. Between 2005-2015, licenses for 127 projects with over 21,000 MW of hydroelectric capacity have expired or will expire.[7] Nearly all of these projects will require the issuance of annual licenses prior to the completion of the relicensing.

Many of these projects are located in areas where ESA-listed species reside or where critical habitat has been desig-

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[6] FERC, Report on Hydroelectric Licensing Policies, Procedures, and Regulations, Comprehensive Review and Recommendations Pursuant to § 603 of the Energy Act of 2000 (May 2001) *available at* http://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf (last visited Feb. 13, 2007).

[7] FERC, Table of Issued Licenses (Feb. 8, 2007), *available at* http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls (last visited Feb. 8, 2007).

nated. This is not surprising, because there are presently over 1,800 species listed as either endangered or threatened by the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") (collectively referenced as "Service Agencies").[8] Of these, over 700 species were added to the lists between 1990 and the end of 2005. Moreover, as of February 5, 2007, critical habitat has been designated for 485 of these species.[9]

As explained below, the Ninth Circuit's decision in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005) ("*Defenders I*") threatens to expand the reach of ESA § 7 beyond what Congress intended. And, if affirmed, the decision could have significant impacts on the operation of non-federal hydroelectric projects; seriously disrupt FERC's hydroelectric relicensing program; and require significant resources of not only FERC, USFWS, and NMFS, but also of licensees and third parties.

Judge Kozinski, dissenting to the decision to deny en banc rehearing, stated "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399 n.4 (9th Cir. 2006) (Kozinski, J., dissenting) ("*Defenders II*"). One such categorical mandate involves the statutory limitations placed upon FERC under the FPA, such as when it issues annual licenses pursuant to § 15(a). *See* 16 U.S.C. § 808(a)(1) ("the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license"). Based upon these constraints and the lack of agency discretion, the D.C. Circuit

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[8] http://ecos.fws.gov/tess_public/SpeciesCountReport.do (last visited Feb. 13, 2007).

[9] http://ecos.fws.gov/tess_public/CriticalHabitat.do?nmfs=1 (last visited Feb. 13, 2007).

in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) ("*Platte River*"), found that FERC issuance of an annual license is not subject to the ESA § 7 consultation requirements. Although the Ninth Circuit never questioned the ultimate holding in *Platte River*, the court's suggestion that § 7 overrides statutory directives and constraints placed upon an agency nevertheless casts an unnecessary cloud on FERC's issuance of annual licenses during the FERC relicensing process.[10]

The application of § 7(a)(2) to FERC and other federal agency actions pursuant to the FPA, however, is not before this Court and is not fully briefed. Obviously, between federal laws, there are significant differences and nuances regarding the nature and scope of agency discretion. This is especially true with respect to the differences between the FPA's annual license provisions and the CWA's National Pollutant Discharge Elimination System ("NPDES") Permit Program transfer decision provisions.[11] These differences

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[10] Because the issuance of a new license at the end of relicensing is more than ministerial, FERC complies with the procedural and substantive aspects of § 7(a)(2) when it issues a new license. *See Cal. Sportfishing Prot. Alliance v. Pac. Gas & Elec. Co.*, 472 F.3d 593, 598-99 (9th Cir. 2006).

[11] For example, in its decision, the Ninth Circuit correctly recognized that, because FERC was obligated to issue the annual license "without any deliberation," the FERC action of issuing an annual license is different from the EPA action of making a NPDES transfer decision. *Defenders I*, 420 F.3d at 970. This distinction is noteworthy. The CWA does require EPA to evaluate (or deliberate) as to whether specific criteria have been met prior to making the transfer decision. *See* 33 U.S.C. § 1342(b) ("The Administrator shall approve each submitted program *unless he determines* that adequate authority does not exist. . .") (emphasis added). There may be some discretion inherent within this administrative evaluation. In contrast, the FPA requires that FERC issue an annual license without any deliberation or evaluation as to whether specific criteria have been met. If the license has expired and the project is subject to relicensing, FERC

and nuances are material in determining the applicability of § 7(a)(2) to a specific agency action. As such, to the extent that the Court deems it necessary to address the Petitioner EPA's Question Presented pertaining to § 7(a)(2), *Amici* urges this Court to limit the scope of its ruling to clarifying the relationship of § 7(a)(2) to the CWA's NPDES transfer decision at issue in this case.

Regardless, the Ninth Circuit should be reversed because of the fundamental errors contained within its expansive decision. Not only could the Ninth Circuit's conclusion that § 7 overrides other statutory constraints threaten to disrupt FERC's relicensing program and its issuance of annual licenses, but it could cause precipitous decisions that would modify and disrupt ongoing project operations. By expanding the reach of the ESA, the Ninth Circuit's analysis might be construed as requiring FERC to initiate § 7 consultations on numerous hydroelectric projects when FERC's enabling statute and applicable regulations provide no discretion to impose the sought-after limitations.

Federal licensing or permitting programs could not function effectively under such a scenario. FERC, for instance, might feel compelled to rely upon a biological opinion developed in the abstract and without an adequate record, and direct the licensee to adopt major modifications of project structures and operations immediately without an appropriate administrative process and substantial evidence. Such modifcations would likely include altered flow regimes, spill requirements, and other hastily adopted and costly terms and conditions that would have to be implemented in advance of any FERC proceeding. Such modifications could also impair the delivery of electric power with little or no correspond-

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must issue an annual license under the terms and conditions of the existing license. 16 U.S.C. § 808(a)(1). FERC has absolutely no discretion under such circumstances.

ing benefit to listed species, and could even result in harm to species.

The Ninth Circuit decision, therefore, creates the potential for unnecessary and irreconcilable conflicts between the ESA and other statutes, which could disrupt or interfere with the Nation's electrical energy supply. To prevent potential conflicts between the ESA and FPA, the Hydroelectric Group files this Amicus Brief in support of the Petitioners.

SUMMARY OF ARGUMENT

The Hydroelectric Group's *Amicus* Brief focuses solely on the Ninth Circuit's assertions that the ESA includes an affirmative *grant of authority* to an action agency to disregard other statutory limitations, and that the nature of the agency action—whether it is discretionary or not—is not altogether significant. In this regard, the Ninth Circuit erred by concluding that the § 7(a)(2) obligations are obligations "in addition to those created by the agencies' own governing statute." *Defenders I*, 420 F.3d at 967. Unless reversed, the Ninth Circuit decision will undermine the established principle that § 7(a)(2) applies only to "actions in which there is discretionary Federal involvement or control." *See* 50 C.F.R. § 402.03.

The Ninth Circuit erred by construing the Service Agencies' joint interpretation that § 7(a)(2) applies to discretionary agency actions, 50 C.F.R. § 402.03, as a "gloss" on and as being "congruent" and "coterminous with" the ESA's statutory reference to actions "authorized, funded, or carried out by the agency." According to the Ninth Circuit, § 7 is triggered unless "the agency in question had 'no ongoing regulatory authority' and thus was not an entity responsible for decisionmaking with respect to the particular action in question." *Defenders I*, 420 F.3d at 968. This expansive interpretation is contrary to Ninth Circuit precedent, impermissibly rejects the expert agencies' interpretation of § 7(a)(2),

and conflicts with the substantial ESA jurisprudence supporting the Service Agencies' interpretation.

Section 7 is only triggered if there is an identifiable, discretionary agency action that is being authorized, funded or carried out.

ARGUMENT

I. SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT OF 1973 DOES NOT OVERRIDE STATUTORY MANDATES OR CONSTRAINTS PLACED ON AN AGENCY'S DISCRETION BY OTHER ACTS OF CONGRESS.

A. The Endangered Species Act.

Pursuant to § 7 of the ESA and its implementing regulations, every federal agency is required to consult with either the USFWS or NMFS prior to authorizing, funding, or carrying out any action that may affect any listed species.[12] Section 7(a)(2) of the ESA provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat . . . unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

Regulations implementing § 7(a)(2) state: "Section 7 and the requirements of this part apply to all actions in which there is

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[12] Other aspects of § 7 include a provision that directs federal agencies to utilize their authorities for the conservation of listed species (16 U.S.C. § 1536(a)(1)), a procedure for conferencing on proposed species and proposed critical habitat (16 U.S.C. § 1536(a)(4)), an early consultation option (16 U.S.C. § 1536(a)(3)), as well as an exemption process – the Endangered Species Committee ("ESC") (16 U.S.C. § 1536(e)).

discretionary Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added).

To assist the federal agency in determining whether the substantive standards of § 7(a)(2) will be met, the Service Agency (either USFWS or NMFS, depending upon the species involved) provides a "biological opinion" that includes a "summary of the information on which the opinion is based", a "detailed discussion of the effects of the action on listed species and critical habitat", and the Service Agency's opinion on "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat . . . ." 50 C.F.R. § 402.14(h); *see also* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02 (defining "biological opinion").

B. The Ninth Circuit's Decision Improperly Expands the Scope of the Endangered Species Act.

The Ninth Circuit, not only incorrectly but also unnecessarily, casts a cloud on when the procedural and substantive obligations under § 7 are triggered. To begin with, the lower court opinion conflates the scope of a § 7 consultation with when a consultation is required. In order to assess whether a § 7(a)(2) consultation is required, it must be determined whether there is any affirmative, identifiable federal agency action[13] and, if so, whether the action is ministerial or

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[13] *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 186-88 (1978) ("TVA"); *W. Watershed Project v. Matejko*, 456 F.3d 922, 930 (9th Cir. 2006) ("Ninth Circuit cases have emphasized that § 7(a)(2) consultation stems only from "affirmative actions" of an agency"); *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079-82 (9th Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995). The need for an affirmative and discrete agency action is apparent. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). Yet, the Ninth Circuit, citing its earlier decision in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994), further suggests that there may be instances where the retention of power to authorize and carry out future discretionary

discretionary. If § 7 is required, then the federal agency must engage in the correct procedure to ensure that the action is not likely to jeopardize the continued existence of an endangered or threatened species or result in the adverse modification or destruction of critical habitat.

Here, the agencies engaged in a consultation and the USFWS prepared a biological opinion, and by doing so necessarily obviated the need to explore whether § 7 consultation is required.[14] The principal issue, therefore, involved the later inquiry: whether EPA acted arbitrarily and capriciously in relying upon a biological opinion that allegedly did not include a sufficient analysis of the effects of the action, and also whether the USFWS acted arbitrarily and capriciously in issuing such a biological opinion.[15]

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decisions is somehow itself an agency action. *Defenders I*, 420 F.3d at 969-70. But the mere ability to undertake an affirmative act in the future, even if the agency has the discretion to do so, is not any such affirmative and discrete agency action triggering § 7(a)(2). *TVA*, 437 U.S. 153, discussed later, involved an "action" that was going to be "carried out" and it does not support circumventing the "action" requirement under § 7(a)(2).

[14] The original challenge to the USFWS' biological opinion in this case occurred in the district court, presumably under this Court's reasoning in *Bennett v. Spear*, 520 U.S. 154, 170 (1997), which concluded that challenges to a Service Agency's biological opinion are to be brought under the Administrative Procedure Act, and presumably in district court pursuant to 28 U.S.C. § 1331. *Defenders I*, 420 F.3d at 955-56. The case was transferred to the court of appeals, consistent with other precedent in the Ninth Circuit and elsewhere suggesting such challenges must be brought originally in the court of appeals when the underlying agency action is reviewable initially in the court of appeals. *Id.*

[15] *See Defenders I*, 420 F.3d at 949-50 (Judge Berzon began her opinion by stating that the principal issue is whether, when engaging in an analysis of the effects of a CWA § 402 transfer decision, the ESA requires that EPA consider the impact on endangered and threatened species and their habitat when it concludes that it lacks the authority to take into account the effects of the action on such species or their habitat.); *see also id.* at 955 ("EPA failed adequately to consider the transfer's impact on

The lower court could have easily ended its opinion by concluding that EPA acted arbitrarily and capriciously, because it "relied during the administrative proceedings on legally contradictory positions" (*Defenders I*, 420 F.3d at 959), and remanded the matter back to EPA for further consideration and a reasoned explanation.[16] It chose not to do so; instead, it embarked upon a foray into § 7 generally, and in doing so erroneously questioned the longstanding view that § 7 only applies when there is an identifiable federal agency action and one that is not ministerial but involves some level of discretion.

This *Amicus* Brief, therefore, focuses solely on the Ninth Circuit's journey into the contours of § 7 and its assertions that the ESA includes an affirmative *grant of authority* to an action agency to disregard other statutory limitations, and that the nature of the agency action—whether it is discretionary or not—is not altogether significant. In this regard, the Ninth Circuit erred by concluding that the § 7(a)(2) obligations are obligations "in addition to those created by the agencies' own governing statute." *Defenders I*, 420 F.3d at 967. Unless reversed, the Ninth Circuit decision will undermine the established principle that § 7(a)(2) applies only to "actions in which there is discretionary Federal involvement or control." *See* 50 C.F.R. § 402.03; *see also Platte River*, 962 F.2d at 33-34 (§ 7 simply "directs agencies to 'utilize their authorities' to

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endangered and threatened species. . ."); *id.* at 957 ("here, lack of adequate consultation between the EPA and the FWS").

[16] If the decision had been remanded back to EPA, the court could have avoided ruling on the adequacy of the biological opinion until after EPA rendered a new final agency action that would again be reviewable. Nevertheless, the court reviewed in part "B" of its opinion (*Defenders I*, 420 F.3d at 959-62) the adequacy of the biological opinion –and concluded that it too lacked reasoned decisionmaking, because of its effects analysis. And so the court could have avoided parts "C" and "D" of its opinion.

carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act"); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("[w]here there is no agency discretion to act, the ESA does not apply"), *cert. denied*, 526 U.S. 1111 (1999).[17]

The Ninth Circuit erred by construing the Service Agencies' joint interpretation that § 7(a)(2) applies to discretionary agency actions, 50 C.F.R. § 402.03, as a "gloss" on and as being "congruent" and "coterminous with" the ESA's statutory reference to actions "authorized, funded, or carried out by the agency." According to the Ninth Circuit, § 7 is triggered unless "the agency in question had 'no ongoing regulatory authority' and thus was not an entity responsible for decisionmaking with respect to the particular action in question." *Defenders I*, 420 F.3d at 968. As Judge Kozinski recognized in the dissent to the denial of the petition for rehearing en banc and as explained below, this expansive interpretation is contrary to Ninth Circuit precedent, impermissibly rejects the expert agencies' interpretation of § 7(a)(2) and conflicts with the substantial ESA jurisprudence supporting the Service Agencies' interpretation. *Defenders II*, 450 F.3d at 398 (Kozinski, J., dissenting). Section 7 is only triggered if there is an identifiable, discretionary agency action that is being authorized, funded or carried out.

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[17] Discretion is essential to determining the applicability of § 7(a)(2) to an agency action for primarily two reasons. First, an agency action that does not cause jeopardy or adverse modification is not barred by § 7(a)(2) prohibitions. 16 U.S.C. § 1536(a)(2). Discretion defines the boundary of causation. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004). Simply put, for an action that is pursuant to a categorical statutory mandate (i.e. a non-discretionary, ministerial action), the statutory mandate, not the agency action, is the cause of the impacts on listed species. Second, when an agency undertakes a non-discretionary action, the agency does not have an opportunity to structure the action to avoid jeopardy or adverse modification. *TVA*, 437 U.S. at 183; *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073-75 (9th Cir. 1996).

Over twenty years ago, the Service Agencies jointly recognized that Congress did not intend that § 7 would apply to non-discretionary agency actions.[18] 50 C.F.R. § 402.03; 51 Fed. Reg. 19,937 (1986) ("a Federal agency's responsibility under § 7(a)(2) permeates the full range of *discretionary authority*. . ." (emphasis added)). Under the agencies' interpretation, an action is non-discretionary if the agency has decision-making authority, yet is not empowered to act to protect endangered or threatened species. *Defenders I*, 420 F.3d at 979 (Thompson, J., dissenting). ESA jurisprudence uniformly followed these expert agencies' interpretation. *See Natural Res. Def. Council*, 146 F.3d at 1125-26; *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998); *Marbled Murrelet*, 83 F.3d at 1073-75; *Platte River*, 962 F.2d at 33-34; *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1079-82. This is because non-discretionary actions, or those over which an agency has no control, do not afford the agency an opportunity to structure the action to avoid jeopardy or adverse modification. *TVA*, 437 U.S. at 183.[19]

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[18] If the statute is ambiguous on this issue and the Service Agencies' construction is reasonable, courts are required to uphold the Agencies' statutory interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Because of the Service Agencies' expertise and delegated statutory authority, this regulatory interpretation is entitled to deference. *See Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 703 (1995) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation.").

[19] A similar rationale exists for compliance with the NEPA, the CWA, and the River and Harbor Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10 (1945). *See Public Citizen*, 541 U.S. 752; *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) ("the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA

This Court's seminal decision in *TVA v. Hill* does not suggest otherwise, although, admittedly, some courts and commentators have expanded this Court's holding in *TVA* beyond the facts and issues presented there. In *TVA*, there undoubtedly remained a § 7 triggering event—something left to be "carried out." TVA still had the discretion to decide whether to proceed with the project, but at considerable cost and not contrary to any other non-discretionary duty or obligation. The plaintiffs sought to prevent TVA from "carrying out" its final construction and operation of the Tellico Dam. The parties agreed that the federal action would result in an undeniable violation of the ESA—the complete eradication of the endangered snail darter. The primary issue was whether the plain language of the ESA could be applied to the final stages of the construction and implementation of the Tellico Dam project. The United States argued that the ESA should not apply to all actions, but rather only those:

> That present the agency with reasonable alternatives; it refers to a stage in the decision-making process where the agency has not substantially completed an "action" but is still in reasonable position of being able to avoid authorizing it, funding it, or carrying it out.

Brief for the Petitioner at 24-25, *TVA v. Hill*, 437 U.S. 153 (1978) (No. 76-1701). In short, the United States sought to avoid § 7 altogether because it had substantially completed the project and believed that it would be too costly to reverse course. The Court rejected reading into the ESA any such exception, but in doing so the Court clearly indicated it was not suggesting that § 7 would apply to non-discretionary

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provides can have no affect on the agency's actions, and therefore NEPA is inapplicable."); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1179 (9th Cir. 2004) (the Ninth Circuit construed the CWA and the River and Harbor Act of 1945 *in pari materia* by limiting the CWA's application to discretionary activities.).

actions.[20] The Court quotes from the legislative history an example raised by Congressmen Dingell: if the Secretary of Defense has *discretion* in exercising bombing activities in the Gulf of Mexico, he would be required to ensure that his activities do not jeopardize the continued existence of the nearby whooping cranes.[21] *TVA*, 437 U.S. at 183.

Indeed, the legislative history surrounding the changes to § 7 confirms that the provision was not intended to confer additional statutory authority upon agencies or impliedly repeal statutory limitations governing agency actions. In 1973, when Congress enacted the ESA, it directed agencies to:

> utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for conservation of endangered species and threatened species . . . and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species . . .

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). The obligations of federal agencies to carry out conservation programs (now contained in § 7(a)(1)) and to avoid jeopardy (now contained in § 7(a)(2)) were both qualified by the phrase "utilize their authorities."

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[20] Now, many years later, perhaps the most fundamental question presented by *TVA v. Hill* is overlooked. As the environmental law professor who litigated the case explains, the issue was whether courts confronted with having to remedy a violation of the Act (and in *TVA* it was admitted) should be able to override a clear congressional mandate, i.e. statutory no-jeopardy obligation, in deciding whether or not to issue an injunction. Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Calif. L. Rev. 524 (1982).

[21] Congressman Dingell prefaced this example by stating "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps *within their power* to carry out the purposes of this act." *TVA*, 437 U.S. at 183 (emphasis added).

When Congress added the § 7 consultation requirements and separated the § 7 conservation and jeopardy avoidance obligations into two separate sentences in 1978, it explained that the revision was merely a restatement of "existing law." H.R. Conf. Rep. No. 95-1804, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486 (emphasis added). At that time, agencies' obligations under "existing law" were clearly limited by their authorities. In 1979, Congress further divided § 7(a) into subsections without making changes to the language pertaining to the conservation and jeopardy avoidance obligations. *See* Act of December 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226. In 1982 and 1988, Congress amended the ESA without amending § 7(a).

Significantly, in adopting the 1988 amendments to the ESA two years after the Service Agencies clarified the role of agency discretion in the consultation process, Congress did not repudiate the regulatory construction adopted by the Service Agencies. *See Edelman v. Lynchburg College*, 535 U.S. 106, 117-18 (2002) ("By amending the law without repudiating the regulation, Congress 'suggests its consent to the Commission's practice.'") *citing EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) and *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984).

Contrary to the Ninth Circuit decision, therefore, Congress enacted significant amendments to the ESA in 1978, 1979, 1982, and 1988 without expanding § 7(a)(2) to compel agencies to override statutory mandates or constraints on agency discretion. The legislative history of these ESA amendments does not support the conclusion that Congress intended to dramatically enlarge the scope of § 7(a)(2) to act outside the realm of agency discretion.[22]

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[22] *See, e.g.*, H.R. Rep. No. 95-1625, at 11-12 and 19-20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9461-62, 9469-70 (App. 490-92, App. 494-97); S. Rep. No. 96-151, at 3-4 (1979) (App. 503-04); H.R.

C. Since *TVA v. Hill*, Federal Courts Have Uniformly Rejected Efforts To Expand The Application Of § 7(A)(2) To Non-Discretionary Actions.

Since *TVA v. Hill*, federal courts have uniformly rejected efforts to expand the application of § 7(a)(2) to non-discretionary actions.[23] Therefore, the Ninth Circuit's summary rejection of the caselaw and, in particular, its treatment of the D.C. Circuit's analysis in *Platte River*, is fundamentally flawed.

In *Platte River*, petitioners challenged annual licenses issued by FERC for two hydroelectric projects on the Platte River. The petitioners argued that ESA § 7 required that FERC do "whatever it takes" to protect the threatened and endangered species that inhabit the Platte River. Under the FPA, however, FERC was precluded from altering the terms of an existing license when issuing annual licenses given to a hydroelectric plant. *Platte River*, 962 F.2d at 34.

The D.C. Circuit, after examining the requirements imposed by ESA §§ 7(a)(1) and 7(a)(2), rejected as "far fetched" the effort to apply § 7 in an instance where the

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Conf. Rep. No. 96-697, at 12-16 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2572, 2575-79 (App. 509-17); H.R. Rep. No 97-567, at 24-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824-29 (App. 518-28); S. Rep. No. 97-418, at 19-20 (1982) (App. 537-42); Pub. L. No. 100-478, 102 Stat. 2306 (1988) (Endangered Species Act Amendments of 1988).

[23] In *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985), the Tenth Circuit held that the Army Corps had a mandatory obligation to consider the impacts of projects that it authorizes or funds, but it never questioned the lower court's conclusion that "[w]hile the Endangered Species Act does not expand the scope of federal agencies' authority, its clear language 'shall insure' directs them to exercise their authority under other statutes to the fullest extent possible to carry out its aims." *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583, 588 (D. Colo. 1983).

agency—in that case, FERC—had no authority to impose conditions on a hydroelectric licensee. *Id.* at 33-34. The court observed that § 7 simply "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act," adding that *TVA* is "hardly authority to the contrary." *Id.* at 34.

The Ninth Circuit, however, erroneously rejects the *Platte River* decision and concludes that it does not reflect a full consideration of the text and history of § 7(a)(2), *Defenders I*, 420 F.3d at 970-71. Yet, the precise issue, including the legislative history of § 7(a)(2) and the difference between § 7(a)(1) and § 7(a)(2), was briefed and presented to the D.C. Circuit Court. The Ninth Circuit's characterization of *Platte River*, therefore, is unsubstantiated and belied by the facts.[24]

Platte River has been followed by the majority of courts. In *American Forest and Paper*, EPA argued that the ESA required that it consider impacts to endangered species when deciding whether to approve Louisiana's NPDES permitting program under CWA § 402(b). *Am. Forest & Paper Ass'n*, 137 F.3d at 298-99. The Fifth Circuit disagreed. The court first concluded that the agency's action was "non-discretionary" because the language of CWA § 402(b) clearly states that the "EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements."[25]

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[24] The Ninth Circuit's further suggestion that the availability of an exemption is somehow relevant (*Defenders I*, 420 F.3d at 970) ignores the function of the exemption. The ESC, 16 U.S.C. § 1536(e)(1), can exempt an agency action from the ESA, but it has no authority to exempt an agency from other laws. For a discussion of the ESC by one who participated in the process, *see* Patrick A. Parenteau, The Exemption Process and the God Squad, *reprinted in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 131 (Baur & Irvin eds. 2002).

[25] Unlike the Fifth Circuit, based upon its expansive definition of discretion, the Ninth Circuit erroneously concluded that the EPA action of

Id. at 297. The court then determined that § 7(a)(2) does not override statutory constraints on agency discretion. The court found that § 7(a)(2) "confers no substantive powers" and "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction." *Id.* at 298-99.

Next, even the Ninth Circuit's own prior cases recognize a limitation on when § 7 may apply. In *Sierra Club v. Babbitt*, several environmental organizations sought to enjoin the construction of a logging road on a right-of-way crossing Bureau of Land Management ("BLM") forestland. Before beginning the new road construction, BLM was contractually entitled to review the proposed route and object to the project only if the "route 1) was not the most direct, 2) would substantially interfere with existing or planned facilities, or 3) would result in excessive soil erosion." *Sierra Club*, 65 F.3d at 1505. The Ninth Circuit held that BLM's contractual agreement relating to the right-of-way limited the agency's continuing ability to influence the private conduct to three factors unrelated to species conservation. The court concluded that, pursuant to 50 C.F.R. § 402.03, § 7 did not apply, because BLM lacked the requisite "*discretionary* Federal involvement or control." *Id.* at 1509 (emphasis in original). Explaining further, the court stated that, "where . . . the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species." *Id.*

In *Natural Resources Defense Council v. Houston*, the Ninth Circuit found that federal reclamation laws gave the Bureau of Reclamation sufficient discretion to trigger a

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approving the NPDES transfer to a state involved discretion. *Defenders I*, 420 F.3d at 970.

§ 7(a)(2) consultation. *Natural Res. Def. Council*, 146 F.3d at 1126 ("government is to renew the contracts on 'mutually agreeable' terms, that water rights are based on the amount of available project water, and that the Secretary of the Interior has the discretion to set rates to cover an appropriate share of the operation and maintenance costs.") (citations omitted).

In *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003), the Ninth Circuit analyzed whether NMFS's issuance of a fishing permit pursuant to the High Seas Fishing Compliance Act ("HSFCA"), 16 U.S.C. §§ 5501-5509, was a discretionary agency action invoking the ESA's consultation requirements. *Id.* at 970. The court defined discretion by stating that "the discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species." *Id.* at 974 (citation omitted). After examining the relevant statutory provisions of HSFCA, which expressly allow NMFS to place conditions and restrictions upon the issuance of a permit, the court concluded that NMFS had "ample discretion" to include conservation measures in an issued permit, thereby triggering the ESA consultation requirement. *Id.* at 975.

Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy, 383 F.3d 1082 (9th Cir. 2004) involved a challenge to the Navy's decision to expand the Trident submarine in Bangor, Washington. The President had ordered the expansion and the Navy lacked discretion to ignore that order. The Ninth Circuit concluded that § 7(a)(2) was inapplicable, because the Navy lacked discretion to cease the Trident operations or change the siting location. *Id.* at 1092.

Other Ninth Circuit precedent similarly recognizes that the application of § 7(a)(2) depends upon the existence of meaningful discretion. *See Envtl. Prot. Info. Ctr.*, 255 F.3d at 1083 (agency did not retain discretionary control over incidental take permit because there was no requirement to reinitiate consultation on subsequently listed species); *Marbled Mur-*

relet, 83 F.3d at 1073-75 (nondiscretionary actions or those over which an agency has no control afford the agency no opportunity to customize the action to avoid jeopardy or adverse modification).

As these decisions demonstrate, consistent with other circuits, the Ninth Circuit historically has conditioned the application of ESA § 7(a)(2) on whether the agency has discretion to take the relevant action to benefit the ESA-listed species. As Judge Thompson recognized, "the court previously recognized that "an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered or threatened species." *Defenders I*, 420 F.3d at 979 (Thompson, J. dissenting). The majority's opinion is the first instance where the Ninth Circuit has applied § 7(a)(2) where the agency lacks discretion.

The structure of the ESA underscores this case law. Congress expressly stated that one of the purposes of the ESA is that agencies "shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c)(1). In § 7(a)(1), Congress repeated this prescription that "Federal agencies shall . . . utilize their authorities in furtherance of the purposes of this chapter. . . ." 16 U.S.C. § 1536(a)(1). Congress' intent to focus on the scope of an agency's authority —or discretionary actions—is also evident elsewhere in the ESA.[26]

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[26] When describing the consultation process, the Committee on Environment and Public Works commented that "[i]t is the intent of the committee that this review process would take place well before the exercise of agency discretion which would result in contracts for construction, actual construction activities, or other potentially destructive activity." H.R. Rep. No. 1625, 95th Cong. 2d Sess. (1978), *reprinted* in A LEGIS. HIST. OF THE ESA OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980 FOR THE COMM. ON ENV'T & PUBLIC WORKS OF THE U.S. SENATE, 97th Cong. 2d Sess. 744 (1982). When issuing a biological

Finally, a primary purpose of § 7(a)(2) consultation is to insure that the Service Agencies with wildlife expertise have meaningful opportunities to influence decisions by the action agencies. Where the action agencies have no authority to make decisions, and thus no discretion, this fundamental purpose of the consultation processes cannot be achieved because the ESA does not provide federal agencies with additional authority to do what Congress has not otherwise authorized to be done.

CONCLUSION

For the reasons set forth above, the Hydroelectric Group respectfully requests that the Court reverse the Ninth Circuit's decision in *Defenders I* and hold that § 7(a)(2) does not override statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

Respectfully Submitted,

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February 20, 2007

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opinion in which jeopardy exists, the Secretary is limited to suggesting reasonable and prudent alternatives that "can be taken by the Federal agency or applicant. . ." 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.02. *Cf. Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998).

Nos. 06-340, 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae address the following questions only:

Did the court of appeals correctly hold that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973?

If so, should the court of appeals have remanded to the Environmental Protection Agency for further proceedings without ruling on the proper interpretation of Section 7(a)(2)?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

In particular, WLF devotes a significant portion of its resources to supporting private property rights from encroachment based on overly broad interpretations of the Endangered Species Act of 1973. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). WLF has also regularly appeared in this and other federal courts to ensure that primary responsibility for interpreting ambiguities in a federal statute is entrusted to the administrative agency charged by Congress with enforcing the statute, not to the federal courts. *See, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

policy, and has appeared as *amicus curiae* in the federal courts on national security-related issues on a number of occasions.

Amici are concerned that the Ninth Circuit's decision has transformed the Endangered Species Act (ESA) into a "super" statute whose provisions should be interpreted in all instances to trump all other federal laws. Unless it is overturned, the Ninth Circuit's decision has the potential to disrupt large portions of the activities of governments at all levels. As Judge Kozinski pointed out in his dissent from the denial of rehearing *en banc*, "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." Pet. App. 78a n.4 (emphasis in original).[2] *Amici* do not believe that anything in the text or history of the ESA supports such a broad interpretation.

Moreover, *amici* are concerned that the Ninth Circuit reached out to decide the underlying ESA issues in a manner that did not demonstrate sufficient deference to the role of the applicable federal agencies to interpret their own statutory mandates. This brief focuses solely on deference-related concerns. While *amici* agree with Petitioners that the Ninth Circuit misinterpreted the ESA, this brief only addresses our belief that the Ninth Circuit erred in arriving at that interpretation without deferring to the views of the federal agencies charged with carrying it out.

Amici are filing this brief with the consent of all parties. Respondents Defenders of Wildlife, *et al.*, and the non-government Petitioners have submitted letters to the Court

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[2] References herein to the Petition Appendix ("Pet. App.") are to the appendix in No. 06-549.

providing blanket consent to the filing of *amicus* briefs. *Amici* have lodged with the Court letters of consent from the federal government and Respondent State of Arizona.

STATEMENT OF THE CASE

This case is a challenge to a decision by the U.S. Environmental Protection Agency (EPA) to transfer to the State of Arizona authority to grant permits for discharges into navigable waters in the State. The Clean Water Act (CWA), which establishes the permitting system, also provides for the transfer of permitting authority from EPA to the States when certain conditions are met. 33 U.S.C. § 1342(b). Moreover, the CWA uses mandatory language in describing EPA's approval of such transfers: it states that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Id.*; *see also* 33 U.S.C. § 1342(b)(1)-(9). As the Ninth Circuit recognized, it is uncontested that Arizona satisfied each of those nine criteria. Pet. App. 31a & n.11.

Rather, Respondents Defenders of Wildlife, *et al.* (collectively, "Defenders") challenge EPA's approval of Arizona's application for permitting authority based on alleged violations of EPA's obligations under the Endangered Species Act (ESA). Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), imposes certain requirements on "each Federal agency" with respect to actions "authorized, funded, or carried out by such agency." In particular, each agency is required – in consultation with those federal agencies designated by Congress to enforce the ESA – to ensure that the continued existence of endangered or threatened species is not

jeopardized by actions attributable to the agency. *Id.*[3] Defenders contends that in approving Arizona's application, EPA did not comply with its § 7(a)(2) responsibilities to ensure that its actions did not jeopardize the continued existence of relevant species.

When initially considering Arizona's application, EPA officials recognized that transfer of permitting authority would entail at least one change in the way in which discharge permit applications within that State would be considered. Permit applications considered by EPA are subject to § 7(a)(2)'s consultation and "not likely to jeopardize" requirements, while applications considered by Arizona would not be – because § 7(a)(2) applies to "each Federal agency," not to State agencies. Based on concern that elimination of the mandatory consultation/no jeopardy process might result in State approval of discharge permits that might (at least indirectly) jeopardize endangered species, EPA consulted with FWS officials regarding Arizona's transfer application. Indeed, based on that

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[3] Section 7(a)(2) of the ESA requires that:

> Each Federal agency shall, in consultation with the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species.

16 U.S.C. § 1536(a)(2). The ESA assigns responsibility for protection of certain marine species to the Secretary of the Commerce (and his designate, the National Marine Fisheries Service). The ESA assigns responsibility for other species to the Secretary of the Interior (and his designate, the Fish and Wildlife Service (FWS)). All of the species at issue here are the responsibility of FWS.

concern, EPA had begun a practice in 1993 of consulting with FWS on all CWA transfer applications filed by States.[4]

Following consultation between FWS and EPA, FWS issued a Biological Opinion which concluded that EPA approval of Arizona's transfer application would have no effect – either direct or indirect – on endangered or threatened species. Pet. App. 10a. FWS said that absence of "section 7-related conservation benefits" when States possess CWA permitting authority cannot be deemed an "indirect effect" of EPA's approval of a transfer application, but rather is solely attributable to Congress's mandate that States are to be granted the permitting authority whenever they meet the nine criteria set forth in the CWA. *Id.* Based on that Biological Opinion, EPA approved the transfer of CWA permitting authority to Arizona in December 2002. *Id.* 12a.

Defenders thereafter filed a petition for review of EPA's transfer decision in the Ninth Circuit. It simultaneously filed a suit in federal district court in Arizona, alleging that FWS's Biological Opinion did not comply with ESA requirements. Finding that the Ninth Circuit possessed exclusive jurisdiction over the challenge to the Biological Opinion, the district court transferred that challenge to the appeals court for consolidation with Defenders' petition for review.

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[4] That practice was memorialized in a February 2001 Memorandum of Understanding (MOA) signed by EPA and FWS. *See* 66 Fed. Reg. 11,202 (Feb. 22, 2001). The MOA made clear, however, that while the agencies would work together to encourage protection of endangered species, States that otherwise met the CWA criteria for transfer of permitting authority would not have their applications denied if they declined to commit to consultation with FWS on future discharge permit applications. *Id.* at 11,206.

In a 2-1 ruling, the Ninth Circuit vacated EPA's decision to approve Arizona's transfer application and remanded the matter to EPA. *Id.* 1a-63a. It also transferred back to the district court Defenders' challenge to the Biological Opinion, "for proceedings consistent with this opinion." *Id.* 63a. The appeals court initially determined that EPA's approval of Arizona's transfer application was arbitrary and capricious (in violation of the APA) "because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." *Id.* 23a. The court held that EPA's determination during administrative proceedings that § 7(a)(2) of the ESA required it to consult with FWS regarding effects of transfer of CWA permitting authority on endangered/threatened species, was inconsistent with its simultaneous determination that such a transfer – when undertaken in compliance with the CWA's directive that transfers "shall" be granted to States that meet nine specified prerequisites – could not be deemed a cause of any effect on endangered species. *Id.* 23a-28a.

The Ninth Circuit did not, however, simply remand the matter to EPA to provide the agency with an opportunity to provide "a plausible explanation for its decision, based on a single, coherent interpretation of the statute." *Id.* 28a. Rather, it went on to address the merits of EPA's "no jeopardy" determination. It determined, contrary to the views of EPA and FWS, that the absence of a consultation requirement when States are administering CWA permit applications must be deemed an effect of an EPA decision to approve a transfer application – and thus that § 7(a)(2) requires EPA to ensure that such a transfer is not likely to jeopardize the continued existence of any endangered/threatened species. *Id.* 28a-48a. In arriving at that determination, the appeals court rejected an argument that an FWS regulation (40 C.F.R. § 402.03) directs that permit transfer decisions should be classified as non-

discretionary decisions to which ESA § 7(a)(2) is inapplicable. *Id.* 38a-44a.[5]

Judge Thompson dissented. *Id.* 63a-67a. He argued that under the CWA, EPA lacked discretion to deny transfer of permitting authority to Arizona and therefore that its decision was not "agency action" within the meaning of § 7 of the ESA. *Id.* 65a.

The Ninth Circuit denied rehearing *en banc*, with six judges dissenting. *Id.* 68a-69a. In his dissenting opinion (joined by five other judges), Judge Kozinski faulted the panel for, *inter alia*, finding an "inconsistency" in EPA's position when the *final* EPA position was internally consistent, *id.* 71a-74a; and in any event, a finding of "inconsistency" should have been the end of the case – such a finding obligated the panel to remand the case to provide EPA an initial opportunity to resolve any inconsistency. *Id.* 72a. Judge Kozinski also disagreed with the panel's interpretation of § 7(a)(2) and faulted the panel for failing to defer to the FWS's reasonable interpretation thereof. *Id.* 74a-76a. In an opinion concurring in the denial of rehearing *en banc*, Judge Berzon (the author of

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[5] That argument was advanced by intervening parties only. The federal defendants declined throughout the appeals court proceedings to take a firm position on the meaning of § 402.03. *Id.* 43a n.19. Rather, the federal defendants took the position that that issue was not before the court. They asked that if the court felt its decision hinged on whether § 402.03 absolved EPA of any obligation to consult with FWS (on the grounds that granting a transfer application is not a "discretionary" act), it should remand to the agency for an interpretation of the regulation. *Id.* They insisted that whether EPA was absolved of its consultation obligations by § 402.03 was irrelevant because "EPA did consult. The only issue before this Court is the adequacy of that consultation." *Id.* (citing July 27, 2005 EPA letter to court, submitted pursuant to Fed.R.App.P. 28(j)).

the panel decision) responded to Judge Kozinski's arguments. *Id.* 83a-92a. She asserted *inter alia* that while "EPA wants to decide the issue *again*, explaining its reasoning once more, . . . [case law governing administrative action] does not require that an agency have *two* chances to consider a factual or legal question before appellate review, only one." *Id.* 85a n.1 (emphasis in original).

SUMMARY OF ARGUMENT

The court of appeals ruled that EPA's decision to transfer permitting authority to Arizona under the CWA was arbitrary and capricious because it was based on inconsistent interpretations of ESA § 7(a)(2). As Judge Kozinski explained in his dissent from denial of rehearing *en banc*, that ruling was based on a faulty understanding of how EPA went about its decision-making process. The FWS's Biological Opinion provided EPA with a reasoned basis for concluding that approving transfer of permitting authority was "not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). The Administrative Procedure Act's (APA) requirement that the transfer decision not be "arbitrary" or "capricious" is fully satisfied by that reasoned basis. *See* 5 U.S.C. § 706(a)(2).

In arriving at a contrary conclusion, the court of appeals was unable to cite any instance in which EPA had concluded that transferring permitting authority to Arizona (or to any other State) would be likely to jeopardize the continued existence of any species. Rather, all the Ninth Circuit could point to were statements made be various EPA officials throughout the administrative process that they deemed EPA bound to *consult* with the FWS regarding the transfer

decision.[6] The court stated that such statements were inconsistent with the interpretation of ESA § 7(a)(2) that led the FWS and EPA to arrive at their "no jeopardy" conclusion. Pet. App. 25a-27a. But any such inconsistent statements do not render the ultimate "no jeopardy" conclusion either arbitrary or capricious. Statements by EPA officials at various levels of the agency that they would consult and/or that they deemed EPA bound to consult with the FWS were at most tangentially related to the decision-making process that led EPA to its "no jeopardy" conclusion. Moreover, EPA took no actions that conflicted with those statements: it did, indeed, consult with the FWS, and Defenders does not contend otherwise. An agency action is not rendered arbitrary or capricious simply because the agency has made statements arguably inconsistent with the rationale underlying its action, when such statements were neither a part of the decision-making process nor the basis for prior, inconsistent actions.

The Ninth Circuit compounded its error when, despite having determined that EPA acted arbitrarily and capriciously, it proceeded to provide what it deemed a definitive interpretation of § 7(a)(2) and the FWS regulations implementing that provision. Under those circumstances, the appeals court should have remanded the case to EPA for further clarification, as EPA explicitly requested the panel to do in the event that the panel attached significance to whether § 7(a)(2) required EPA to consult with the FWS. This Court on several occasions has summarily reversed the Ninth Circuit for failing to remand cases for clarification by the agency under similar circumstances.

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[6] EPA and FWS did not, of course, adhere to that position during proceedings before the Ninth Circuit; as noted above, they took no position on the issue in the appeals court. Moreover, they contend before *this* Court that § 7(a)(2) does *not* require consultation.

The mandatory remand requirement is an outgrowth of this Court's recognition that federal courts should defer to a reasonable interpretation of a federal statute rendered by the agency delegated by Congress with responsibility for administering the statute, as well as to the agency's reasonable interpretation of its own regulations. This Court recently made clear that an agency is not bound by a federal appeals court's contrary interpretation of a statute it is charged with enforcing, even when the appeals court arrived at its interpretation before the agency announced its views. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005). Thus, a remand is a necessity in cases, as here, where an appeals court has vacated agency action as arbitrary and capricious for reasons unrelated to a claim that the agency has acted in clear violation of its statutory authority. If appeals courts were to eschew a remand and instead to proceed to interpret the underlying statutory provisions, one could reasonably expect agencies to begin exercising their discretionary authority to "overrule" the decision of the appeals courts. Enforcing the mandatory remand policy is the only means of avoiding that anomaly.

The only exception to that rule arises in those situations in which an appeals court can fairly determine that the statute at issue is so clear on its face that there is no room for agency discretion in its interpretation. But any such determination presupposes that the appeals court recognizes the normal rule of deference and has concluded, after undertaking an explicit *Chevron* analysis, that the statute leaves no room for agency discretion. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the absence of any such analysis by the Ninth Circuit panel, its only proper response after determining that EPA had acted arbitrarily and capriciously was to remand the case to provide the agency with

an opportunity to provide a more reasoned justification for its action.

ARGUMENT

I. EPA'S ALLEGEDLY INCONSISTENT INTERPRETATIONS OF § 7(a)(2) DID NOT RENDER ITS TRANSFER DECISION ARBITRARY AND CAPRICIOUS

Section 7(a)(2) of the ESA imposes two distinct requirements on a federal agency: (1) it must ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species"; and (2) it must do so "in consultation with" the FWS and/or the National Marine Fisheries Service (depending on the species at issue). 16 U.S.C. § 1536(a)(2). At issue here is whether those requirements are triggered by a EPA decision to transfer CWA permitting authority to a State. The Ninth Circuit ruled that EPA's transfer decision in this case was arbitrary and capricious because it was based on an EPA determination that the transfer to Arizona implicated the second of these two § 7(a)(2) requirements but not the first. Pet. App. 23a-28a. The court reasoned that the two requirements are "triggered" by the same event: "any action authorized, funded, or carried out" by a federal agency. *Id.* 26a. Thus, the court reasoned:

> The two propositions that underlie the EPA's action . . . cannot both be true. Because the agency's decisionmaking was based on contradictory views of the same words in the same statutory provision, the ultimate decision was not the result of reasoned decisionmaking.

Id. 26a-27a.

As Judge Kozinski explained in his dissent from denial of rehearing *en banc, id.* 71a-74a, the appeals court's ruling was based on a flawed understanding of how EPA went about its decision-making process. First, the ruling is based on the erroneous assumption that the agency's "no jeopardy" determination was based on a finding that the transfer decision was not an "action authorized, funded, or carried out" by EPA. EPA made no such finding.[7] Rather, EPA determined that any indirect effects of a transfer (such as the absence of a requirement that State officials consult with the FWS) were solely attributable to Congress's mandate that States are to be granted the permitting authority whenever they meet the nine statutory criteria – and not attributable to EPA's non-discretionary decision to adhere to Congress's directive. Thus, the "trigger" for EPA's "no jeopardy" determination was a statutory provision (33 U.S.C. § 1342(b), the CWA's mandatory transfer provision) with no obvious connection to § 7(a)(2)'s consultation requirement.

Second, it simply is not true, as the Ninth Circuit asserted (Pet. App. 27a), that EPA's decision-making (*i.e.*, its decision to approve Arizona's transfer application after making its "no jeopardy" determination) was in some way "based on" its views that it was required to consult with the FWS regarding the transfer application. EPA approved the application based solely on its determinations that Arizona had met the nine CWA prerequisite and that its decision could not be deemed to have any effects (and certainly no existence-jeopardizing

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[7] In his dissent from the panel decision, Judge Thompson opined that EPA's transfer decision was not "agency action" within the meaning of § 7(a)(2). *Id.* 65a. That was not EPA's rationale for its "no jeopardy" determination, and EPA has at most given a lukewarm endorsement to Judge Thompson's view. *See* Federal Petition at 13 n.4.

effects) on endangered species. There is nothing to suggest that the approval decision was affected in any way by EPA's views on the consultation requirement; the decision would have been the same regardless whether EPA deemed itself bound to consult with the FWS.

Even if one accepts the Ninth Circuit's conclusion that there was an inconsistency between EPA's two determinations – § 7(a)(2) required consultation with the FWS regarding transfer applications, yet approval of such applications should not be deemed the cause of subsequent adverse impact on endangered species – that inconsistency does not render the transfer decision arbitrary and capricious, given that the decision was based solely on the "no jeopardy" determination, not the consultation determination. An agency action is not rendered arbitrary or capricious simply because the agency has made statements arguably inconsistent with the rationale underlying its action, when such statements were neither a part of the decision-making process nor the basis for prior, inconsistent actions.

None of the cases cited by the Ninth Circuit in support of its contrary conclusion are on point. For example, the court cited *General Chemical Corp. v. United States*, 817 F.2d 844 (D.C. Cir. 1987), for the proposition that agency action is arbitrary and capricious when its reasoning is "internally inconsistent and inadequately explained." Pet. App. 22a, 23a (citing *General Chemical*, 817 F.2d at 857). But the "internal inconsisten[cies]" at issue in *General Chemical* all related to a legal conclusion that the Interstate Commerce Commission adopted as the basis for its ruling that certain railroads were not "market dominant." Nothing in the D.C. Circuit's opinion suggests that agency action is arbitrary or capricious simply because the agency has made determinations that, while

arguably inconsistent with the legal rationale for the action, played no role in the decision-making process.

The Ninth Circuit's reliance on *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), is similarly misplaced. Pet. App. 21a. *Motor Vehicle Mfrs.* addressed adoption of agency policies that are inconsistent with prior policies, not (as here) alleged inconsistencies between the rationale underlying an agency policy and other positions adopted by the agency. *Motor Vehicle Mfrs.* requires that "an agency changing its course must supply a reasoned analysis" that explains its change of course. *Id.* at 57. Nothing in *Motor Vehicle Mfrs.* suggests that an agency's reasoned analysis is impugned because, in statements that played no part in the decision-making process, the agency adopted positions that are to some degree at odds with the rationale underlying the agency's decision.

This Court recently rejected an arbitrary and capricious claim under similar circumstances. The respondents in *Nat'l Cable* argued that the FCC acted arbitrarily and capriciously in exempting cable modem service providers from common-carrier regulation while not extending a similar exemption to DSL providers – even though the rationale for providing such an exemption applied with similar force to both groups. The Court denied the respondents' claim that this somewhat inconsistent regulatory position rendered arbitrary and capricious the FCC's decision to grant an exemption to cable modem service providers. *Nat'l Cable*, 545 U.S. at 1000-1002. The Court said that any inconsistency with prior decisions involving DSL providers was unobjectionable because the FCC had provided a reasoned explanation regarding why changed conditions in the telecommunications industry warranted granting an exemption for cable modem service providers. *Id.* The less-favored treatment afforded

DSL providers was not deemed a reason to overturn the exemption for cable modem service providers. The Court deemed it sufficient that the FCC had pledged to reconsider its treatment of DSL providers, stating, "Any inconsistency between the order under review and the Commission's treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service." *Id.* at 1002.

Any inconsistency between the rationale underlying EPA's "no jeopardy" determination and its view that CWA permitting authority transfer applications trigger § 7(a)(2)'s consultation requirement is similarly unobjectionable. Just as in *Nat'l Cable*, any inconsistency in agency positions is largely attributable to EPA's and the FWS's changing interpretations of the statutes they are charged with administering. The Biological Opinion issued by the FWS in this case provided EPA with a reasoned basis for concluding that approving transfer of permitting authority was "not likely to jeopardize the continued existence of any endangered or threatened species." 16 U.S.C. § 1632(a)(2). The APA's requirement that the transfer decision not be "arbitrary" or "capricious," 5 U.S.C. § 706(a)(2), is fully satisfied by that reasoned basis. Any inconsistency between the Biological Opinion's rationale and EPA's views on consultation was likely a product of the time lag that often accompanies adoption of new agency positions. Indeed, recent correspondence between EPA and the FWS confirms that those agencies now recognize that the rationale underlying the Biological Opinion suggests that the ESA does not *require* EPA to consult with the FWS on CWA permitting authority transfer applications. *See* Pet. App. 93a-116a. As *Nat'l Cable* demonstrates, the fact that the agencies' position on the consultation requirement did not change until some months after the FWS set forth its position on the "not

likely to jeopardize" requirement does not render EPA's Arizona transfer decision arbitrary or capricious.

Finally, *amici* note that regardless whether EPA was required by § 7(a)(2) to consult with the FWS, it did in fact consult – just as it said it would. Indeed, although both EPA and the FWS have now taken the position that consultation is not mandatory in connection with CWA transfer applications, the agencies plan to continue their cooperative relationship in such cases for the benefit of endangered species. Such consultation and cooperation is generally to be commended; but the fact that agencies have chosen to consult with one another should not render arbitrary and capricious a logically distinct determination that approvals of CWA transfer applications cannot be deemed the cause of any adverse impacts on endangered species.

II. HAVING DETERMINED THAT EPA ACTED ARBITRARILY AND CAPRICIOUSLY, THE NINTH CIRCUIT SHOULD HAVE PROVIDED EPA ANOTHER OPPORTUNITY TO CONSTRUE § 7(a)(2)

The Ninth Circuit compounded its error when, despite having determined that EPA acted arbitrarily and capriciously, it proceeded to provide what it deemed a definitive interpretation of § 7(a)(2) and the FWS regulations implementing that provision. Under those circumstances, the appeals court should have remanded the case to EPA for further clarification, as EPA explicitly requested the panel to do in the event that the panel attached significance to whether § 7(a)(2) required EPA to consult with the FWS. This Court on several occasions has summarily reversed the Ninth Circuit for failing to remand cases for clarification by the agency under similar circumstances.

In *Immigration and Naturalization Service v. Ventura*, 537 U.S. 12 (2002), the Ninth Circuit determined that the Bureau of Immigration Appeals (BIA) had erred in declaring an alien ineligible for asylum in this country on the basis of claims that he had been persecuted in Guatemala on account of his political opinions. The federal government, however, had raised alternative grounds for denying asylum, and those grounds had not yet been addressed by the Immigration Judge and the BIA. Over the government's objections, the Ninth Circuit addressed (and ultimately rejected) that alternative claim. This Court summarily reversed, ruling that the Ninth Circuit should have remanded the case to the Immigration Judge to allow him to consider the alternative claim in the first instance. The Court cautioned:

> A court of appeals "is generally not empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* . . . Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.

Ventura, 537 U.S. at 16.

The Court summarily reversed the Ninth Circuit yet again last spring in another immigration case in which the appeals court declined to remand a case for initial administrative consideration of a legal issue but instead addressed the issue on its own. *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006). The Court held that the Ninth Circuit violated the "ordinary remand rule" and that its error was "obvious in light of *Ventura*." *Id.*

at 1614. The Court said that requiring remand "except in rare circumstances" has numerous advantages:

> "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."

Id. at 1615 (quoting *Ventura*, 537 U.S. at 17).

In defending the Ninth Circuit's decision to set out a definitive interpretation of ESA § 7(a)(2) and the FWS's regulations, Judge Berzon (author of the panel decision) attempted to distinguish *Ventura* and *Thomas* by noting:

> In *Thomas*, the Supreme Court faulted this court for not giving the agency an opportunity to decide an issue in the first instance. Here, in contrast, the EPA did decide that a transfer was appropriate and that it did not have the authority to consider the impact on endangered and threatened species of the transfer decision. We disagreed with both conclusions. Now, the EPA wants to decide the issue *again*, explaining its reasoning once more. *INS v. Ventura*, 537 U.S. 12 (2002), does not require an agency have *two* chances to consider a factual or legal question before appellate review, only one.

Pet. App. 85a (Berzon, J., concurring in denial of rehearing *en banc*).

With respect, Judge Berzon's rationale fails to come to grips with the "ordinary remand rule." That rule does not limit federal agencies to only a single opportunity to articulate a

reasoned analysis to justify its actions, with the appeals court free to write on a clean slate if the agency slips up on the first go-round. Rather, an agency deemed to have acted arbitrary and capriciously is still permitted another opportunity to get it right:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co., 470 U.S. at 744.

The mandatory remand requirement is an outgrowth of this Court's recognition that federal courts should defer to a reasonable interpretation of a federal statute rendered by the agency delegated by Congress with responsibility for administering the statute, as well as to the agency's reasonable interpretation of its own regulations. *Chevron*, 467 U.S. at 844. Such deference is warranted because Congress is deemed to have implicitly delegated to such an agency the authority to fill any gaps left by the statute. *Id.* *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). By remanding proceedings to the agency in those instances in which the agency is determined to have acted arbitrarily or capriciously – rather than arrogating to itself responsibility for interpreting the statute – a court honors

Congress's determination regarding how gaps in the statute are to be resolved.

The Court recently made clear that an agency is not bound by a federal appeals court's contrary interpretation of a statute it is charged with enforcing, even when the appeals court arrived at its interpretation before the agency announced its views. *Nat'l Cable*, 545 U.S. at 982-83. As the Court explained:

> A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative construction occurs.

Id. at 983.

Thus, a remand is a necessity in cases, as here, where an appeals court has vacated agency action as arbitrary and capricious for reasons unrelated to a claim that the agency has acted in clear violation of its statutory authority. If appeals courts were to eschew a remand and instead to proceed to interpret the underlying statutory provisions, one could reasonably expect agencies to begin exercising their discretionary authority to "overrule" the decisions of the appeals courts. Enforcing the mandatory remand policy is the only means of avoiding that anomaly.

The only exception to that rule arises in those situations in which an appeals court can fairly determine that the statute at issue is so clear on its face that there is no room for agency discretion in its interpretation. *See id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). But any such determination presupposes that the appeals court recognizes the normal rule of deference and has concluded, after undertaking an explicit *Chevron* analysis, that the statute leaves no room for agency discretion.

There is no indication that the Ninth Circuit even considered whether § 7(a)(2) contained any ambiguities or whether, alternatively, it was so unambiguous that it left no room for agency discretion.[8] In construing the meaning of a key FWS regulation, 50 C.F.R. § 402.03,[9] the panel gave lip service to the need to defer to "an agency's interpretation of its own regulation," Pet. App. 40a, but then proceeded to divine *EPA*'s interpretation of the FWS regulation despite EPA's repeated insistence in the Ninth Circuit that it was not taking a position on the meaning of that regulation. *Id.* 40a and 43a n.19.

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[8] Any claim that § 7(a)(2) leaves no room for agency discretion seems far-fetched on its face. The statute provides virtually no guidance regarding what environmental effects are sufficiently severe that they might reasonably be deemed "likely to jeopardize the continued existence of any endangered or threatened species," or what steps are sufficient to "insure" that agency actions are not likely to have such effects.

[9] Section 402.03 provides that § 7(a)(2) applies only to actions "in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added).

In the absence of any explicit *Chevron* analysis by the Ninth Circuit panel, its only proper response after determining that EPA had acted arbitrarily and capriciously was to remand the case to give the agency an opportunity to provide a more reasoned justification for its action. By instead proceeding to supply a detailed interpretation of EPA's obligations under ESA § 7(a)(2), the Ninth Circuit once again flagrantly disregarded the "ordinary remand rule." *Thomas*, 126 S. Ct. at 1614.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF WESTERN URBAN WATER COALITION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Western Urban Water Coalition ("WUWC") is a national association of the municipal water supply utilities that serve most of the largest cities in the western United States. The charter of WUWC members is to provide reliable, high-quality urban water supplies for present and future water consumers. Urban water supplies must be adequate to accommodate growth, sustain people, and maintain and build the economy. WUWC utilities own and operate water supply projects and, in many instances, wastewater treatment facilities for this purpose. WUWC members serve over 35 million urban water consumers in Arizona, California, Colorado, Nevada, Oregon, and Washington.

All WUWC members operate in states that have been delegated authority to issue permits under the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") program. Many WUWC members currently hold, or are applying for, such permits, which are integral to the operation of their utility systems. If the Court upholds the decision below in *Defenders of Wildlife v. EPA* ("*Defenders*"), 420 F.3d 946 (9th Cir. 2005), it will likely result in severe administrative delays, unnecessary costs, and operational uncertainty, threatening existing and future water utility infrastructure.

Many WUWC members also deliver water to their customers under longstanding allocations of water established

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[1] In accordance with the Court's Rule 37, the Western Urban Water Coalition has received written consent of counsel from all parties to file this brief as *amicus curiae*. The Consents have been filed with the clerk.

by law, treaty, or contractual agreements. The Ninth Circuit decision could cause the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, to trump these long-term water allocation authorities, seriously disrupting the water rights and distribution systems in the western states.

SUMMARY OF ARGUMENT

This case focuses on the relationship between section 402(b) of the CWA, 33 U.S.C. §1342(b), and section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2). Section 402 *requires* EPA to approve state requests to transfer administration of the NPDES permitting program if listed statutory criteria are met. When federal agencies have a non-discretionary duty to act, as EPA does under section 402, section 7(a)(2) does not apply.

The Ninth Circuit construed section 402 and section 7(a)(2) to be in conflict and gave the ESA primacy over the CWA. The Ninth Circuit held that the requirements of section 7(a)(2)—to consult and to insure that listed species are not jeopardized and their critical habitats are not destroyed or adversely modified— can require federal agencies to deviate from express mandates appearing in their governing statutes. To reach this conclusion, the Ninth Circuit relied principally on *TVA v. Hill*, 437 U.S. 153 (1978). *TVA*, however, did not reach the question whether section 7(a)(2) overrides non-discretionary duties set forth in other federal statutes, and it does not support the Ninth Circuit's conclusion.

The Ninth Circuit also erred by ruling that EPA's transfer of NPDES authority is the "cause" of effects on listed species. This result is contrary to the Court's causation

analysis in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which requires a direct cause-and-effect relationship between the federal action and the prohibited result. The mere transfer of NPDES authority has no direct consequences on listed species or their critical habitat. Even if section 7(a)(2) applies to non-discretionary acts, it is not triggered by NPDES delegation decisions because the decision itself has no effect on listed species or critical habitat.

In addition to creating an irreconcilable conflict between key provisions of the CWA and the ESA, the Ninth Circuit's opinion in *Defenders* thwarts congressional efforts at cooperative federalism. It casts a cloud over many federally-delegated permitting programs, upon which a broad range of entities like the members of WUWC rely, and renders such programs susceptible to injunction. It also calls into question long-settled water rights and allocation schemes in western states. The decision below should be reversed.

ARGUMENT

The Ninth Circuit erred by finding that a conflict exists between section 7(a)(2) and EPA's non-discretionary duty to delegate the administration of its NPDES program to states under section 402 of the CWA. The consultation and no-jeopardy/no-critical habitat destruction provisions of section 7(a)(2) do not apply to non-discretionary actions, such as EPA's section 402 mandate, and, in any case, do not apply when a federal action is not the direct cause of any potential harm to protected species.

Reversing the Ninth Circuit's decision will not have the effect of denying listed species protection under the ESA. To the contrary, extensive and significant protection is still

afforded to ESA-covered species and their critical habitats from the effects of discharges subject to state-delegated permits.[2] Upholding the Ninth Circuit's decision, however, will not only create an irreconcilable conflict between the ESA and the CWA, but could also force federal resumption of NPDES permitting and substantially disrupt comprehensive water planning and management throughout the western states.

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[2] Section 9, for example, provides that it is unlawful for any person to take any listed species of fish and wildlife. 16 U.S.C. § 1538(a)(1). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* § 1532. The "take" prohibition of section 9 goes beyond the reach of section 7(a)(2) and applies not just to federal actions, but to the activities of state governments, corporations, municipalities, individuals, and others. It applies to private as well as public lands. The U.S. Fish and Wildlife Service ("FWS") has further defined the prohibited act of causing "harm" to listed species to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). The National Marine Fisheries Service ("NMFS") has a similar definition for aquatic species. *See* 50 C.F.R. § 202.102. Additionally, section 4 of the ESA requires FWS and NMFS to develop and implement recovery plans for listed species. 16 U.S.C. § 1533(f)(1). Recovery plans provide important conservation guidance to federal agencies, and can serve as a blueprint for removing a species from listing. Finally, most states have their own endangered species laws. To be eligible for federal funding, these state programs must meet standards specified in the federal ESA to ensure adequate protection of listed species. *Id.* § 1535(f).

A. Section 7(a)(2) Does Not Apply to Section 402 Delegation Decisions Because Such Decisions Are Non-Discretionary

Section 7(a)(2) requires federal agencies to "insure" that any action "authorized, funded, or carried out" by the agency will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species." 16 U.S.C. §1536(a)(2). Federal agencies generally fulfill their section 7(a)(2) responsibilities through the consultation process defined by statute and regulation. *Id.* §1536(b)-(d); 50 C.F.R. Pt. 402. If a proposed federal action may affect a listed terrestrial or freshwater species, or its designated critical habitat, the agency consults with FWS to evaluate the action's impacts and minimize any effects. 16 U.S.C. §1536(a)(2); *see Bennett v. Spear*, 520 U.S. 154, 158, 169-70 (1997). When the action affects marine species, the agency consults with NMFS. During consultation, a federal agency and any private permit applicant may not make irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardy. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

The consultation and no-jeopardy/no-critical habitat destruction requirements set forth in section 7(a)(2) do not apply to every federal action. Instead, section 7(a)(2) is limited to those actions in which a federal agency has discretion and where the federal agency's actions are the direct cause of effects to listed species or their critical habitat.

1. The Courts Have Consistently Held that Section 7(a)(2) Applies Only to Discretionary Decision-Making

This Court held in *TVA v. Hill* that section 7(a)(2) takes priority over *discretionary* federal actions. In that case, TVA exercised its discretion by deciding to locate a federally funded dam on a certain segment of the Little Tennessee River. 437 U.S. at 157. While congressional committees allocated funds for the Tellico Dam project, those appropriations did not mandate construction of the dam in a specific location. *Id.* at 189 ("There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the [ESA]. These appropriations, in fact, represented relatively minor components of the lump-sum amount for the *entire* TVA project.") (emphasis in original).

Since *TVA v. Hill*, the courts have consistently considered whether discretionary federal authority exists over the proposed action in deciding whether section 7(a)(2) applies. *See, e.g., American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297-99 (5th Cir. 1998) (no federal discretionary authority over state-issued NPDES permits upon which to base section 7(a)(2) consultation); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) (FWS's advice to timber company regarding company's compliance with other ESA obligations lacked requisite degree of discretionary federal control to trigger section 7(a)(2)); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (BLM decision to grant right-of-way pursuant to an existing easement agreement "lack[ed] the discretion to influence the private action"); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding that FERC lacked discretion under

its enabling statute to impose conditions under section 7(a)(2) to protect listed species).

Those cases that have considered the issue, including other Ninth Circuit decisions, found that section 7(a)(2) does not apply to non-discretionary decision-making. *See, e.g., Western Watersheds Project v. Matejko*, 456 F.3d 922 (9th Cir. 2006) (finding that the duty to consult is only triggered where there is discretionary action); *Ground Zero Center for Nonviolent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding that Navy did not need to consult regarding new missile program because Navy lacked discretion; any consultation by Navy would be "exercise in futility"). *See also, In re Operation of the Missouri River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005) (wildlife protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary duty or exceed its statutory authority); *American Forest and Paper*, 137 F.3d at 297; *Strahan v. Linnon*, 967 F. Supp. 581, 607-08 (D. Mass. 1997), *aff'd*, 187 F.3d 623, 1998 WL 1085817 at *3 (1st Cir. 1998) (unpublished) (section 7(a)(2) does not apply to certificates issued by the Coast Guard based on the agency's limited statutory discretion); *Platte River Whooping Crane*, 962 F.2d at 34. As these decisions confirm, where federal decision-making is non-discretionary, section 7(a)(2) does not apply.

2. FWS Interprets Section 7(a)(2) as Applicable Only to Discretionary Federal Action

Consistent with *TVA* and as other courts have held, FWS interprets section 7(a)(2) to reach only discretionary agency actions. In 1986, FWS adopted regulations that expressly limited section 7(a)(2) to discretionary actions. *See* 50 C.F.R. §§ 402.02, 402.03. The regulations provide that "[s]ection 7(a)(2) . . . appl[ies] to all actions in which there is

discretionary Federal involvement or control." *Id.* § 402.03 (emphasis added). Conversely, where discretion is lacking, as with a transfer of NPDES authority under Section 402 of the CWA, section 7(a)(2) is not applicable.

Another FWS regulation supports the view that it is the statutory authority under which an agency is making a permitting decision, and *not* section 7(a)(2) of the ESA, that determines whether the agency has discretion. *See id.* § 402.02. If the ESA creates jurisdiction and authority independent of the primary statute under which an agency is acting, regulations implementing section 7(a)(2) would not limit the range of alternatives to be considered under section 7(a)(2) to only those falling within the action agency's primary statutory mandate. Section 402.02 of FWS's regulations, however, provides that the Secretary's authority to propose alternatives that avoid jeopardy is just so limited. FWS regulations limit the Secretary's consideration of alternatives under section 7(a)(2) to only those that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." *Id.* Alternatives falling outside the legal authority and jurisdiction established by the action agency's primary statutory mandate cannot be implemented, and thus, there can be no requirement to consult with respect to those alternatives before taking action.

Through its regulations, FWS has construed section 7(a)(2) in a manner that avoids conflicts with other statutes that impose mandatory duties on an action agency. FWS's construction of section 7(a)(2) is reasonable and should be accorded substantial deference. *See Sweet Home*, 515 U.S. at 703 ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some

degree of deference to the Secretary's reasonable interpretation."). Under the ESA regulations, as under the case law, section 7(a)(2) does not apply to non-discretionary actions.

3. Section 402 Delegations are Non-Discretionary

Because section 7(a)(2) applies only to discretionary decision-making, it has no application to, and is not in conflict with, NPDES delegation decisions under section 402. The CWA seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, "the [CWA] prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the [CWA]." *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)).

Under the CWA, discharges are authorized primarily through the NPDES permitting program. Section 402 "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Id.* at 102. Consonant with the statutory policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), and for states to implement the NPDES permitting program, section 402(b) provides that EPA "*shall approve*" a state's request to transfer administration of the NPDES program to the state "*unless*" the agency determines that the state lacks adequate authority to administer the program in compliance with nine specific criteria. *Id.* § 1342(b)(1)-(9) (emphasis added). None of the criteria for state assumption of the NPDES

program involves prevention of harm to wildlife listed under the ESA.

Once the transfer of NPDES authority is approved, the CWA requires EPA to conduct oversight to determine whether the delegated program is being administered "in accordance with the requirements of this section." *Id.* § 1342(c)(3). If the state's administration of the program is deemed deficient, EPA must demand that the state take corrective action, and if corrective action is not taken, EPA "shall withdraw approval of such program." *Id.*

Courts have consistently construed the nine criteria of section 402(b) as binding and exclusive, removing EPA's discretion to deny approval of State programs that comply with the criteria. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 208 (1976) (EPA "shall approve" transfer when state program is in compliance with guidelines and supported by adequate authority); *American Forest and Paper*, 137 F.3d. at 297 (the language of 402(b) is "non-discretionary"); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (section 402(b) "commands" EPA to "approve the state permit system" once the statutory criteria are met); *Citizens for a Better Environment v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) . . . [EPA] must approve the program.").

Each provision of section 402 related to state NPDES programs is set forth in the clearest of mandatory terms: EPA "shall approve" transfer requests; it "shall . . . notify" the state if corrective action is needed; and, if corrective action is not taken, EPA "shall withdraw approval of such program." Because EPA is expressly compelled by law to act consistently with section 402(b), *TVA v. Hill* does not provide

controlling authority, and it does not answer the question whether section 7(a)(2) applies to non-discretionary federal actions, such as delegation of NPDES authority. As noted above, *TVA v. Hill* addressed only discretionary agency action. Reliance on *TVA v. Hill* to answer the question before the Court is therefore misplaced. Instead, cases finding that section 7(a)(2) applies only to discretionary actions support finding that NPDES delegation decisions are not subject to the ESA consultation and no jeopardy requirements.

B. Section 7(a)(2) Does Not Apply to Section 402(b) Because There is No Direct Causation Between the Federal Action and the Effects on Protected Species

Even if the Ninth Circuit were correct in extending section 7(a)(2) to non-discretionary action, EPA's delegation of its NPDES program to states does not cause adverse effects on listed species so as to activate the consultation duty or the prohibitions on jeopardy and critical habitat destruction or adverse modification. Section 7(a)(2) imposes a duty on federal agencies to insure that species are not jeopardized, and that critical habitats are not destroyed or adversely modified, by actions attributable to the agency. Once administration of the NPDES program is transferred, as Congress directed pursuant to section 402, it is the state, and its administration of its own NPDES program, that is directly responsible for the effects flowing from its permitting decisions. A congressional mandate to delegate NPDES program administration to a state does not make EPA responsible for any effects to a species that might occur by virtue of that state's administration of the program. Such effects are not proximately caused by non-discretionary delegation decisions.

This Court's holding in *Public Citizen* supports the conclusion that EPA cannot be considered the legal cause of any effects on listed species resulting from a state's administration of its delegated NPDES permitting authority. *Public Citizen* held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. The question involved was whether the Federal Motor Carrier Safety Administration ("FMCSA") was required under the National Environmental Policy Act "to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers" before deciding whether to approve registration for such trucks. *Id.* at 756. This Court found that the FMCSA's governing statute uses mandatory language that compels the FMCSA to grant registration to any applicant that satisfies certain enumerated criteria. *Id.* at 766. This Court rejected the contention that an agency's action could be considered a "cause of an environmental effect even when the agency has no authority to prevent the effect." *Id.* at 767.

The Ninth Circuit's conclusion that EPA's approval of state requests to transfer NPDES permitting authority "will cause whatever harm may flow from the loss of section 7 consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer," *Defenders*, 420 F.3d at 971, is inconsistent with this Court's decision in *Public Citizen*. Here, as in *Public Citizen*, EPA has fulfilled a statutory mandate. Even if effects to species could be traced along the labyrinthine path from the transfer approval to jeopardy to species or destruction of critical habitat, they would be caused by discharges authorized by administering states and not by EPA's non-discretionary approval of the program delegation.

In fact, FWS has concluded that NPDES transfer decisions do not "cause" impacts to species:

> [The] loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to [CWA] permits reflects Congress's decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the [CWA].

Defenders, 420 F.3d at 953 (quoting FWS's biological opinion to EPA).

The plain language of section 402 does not make EPA responsible for effects on protected species flowing from state NPDES permitting decisions. If Congress wants to hold EPA responsible for such effects in the manner the Ninth Circuit found, it has the power to do so. Congress is free to add another criterion for NPDES transfers that would make section 7(a)(2) directly applicable or limit transfers to only those states having state ESA programs that meet specific requirements. It has not done so, and this Court should support that judgment by Congress by reversing the decision below.

C. Section 7(a)(2) Does Not Implicitly Repeal Section 402, Which Is A Required Result of the Ninth Circuit's Holding

Properly construed, section 7(a)(2) does not conflict with section 402. *TVA v. Hill* held that saving listed species is to be afforded "first priority" by federal agencies, 437 U.S. at 185, but it did so in the context of *discretionary* federal

action. As has been found by all other circuits to have considered the issue, section 7(a)(2) is limited to discretionary agency action. Simply put, no conflict arises between section 7(a)(2) and EPA's delegation mandate under section 402 because the former does not apply to the latter.

The Ninth Circuit, however, has forced EPA into an untenable position by ruling that section 7(a)(2) applies to section 402 transfer decisions. On the one hand, through section 402, Congress directs EPA to delegate federal functions to states under a scheme of cooperative federalism.[3] On the other hand, the Ninth Circuit decision insists that EPA must engage in section 7(a)(2) consultation and either deny the transfer application for reasons not included in the applicable criteria or approve the transfer notwithstanding the results of consultation.

The Ninth Circuit's decision creates an avoidable dilemma that has direct consequences for federal and state agencies and permit applicants. By forcing EPA to violate the mandate in section 402 by applying section 7(a)(2), the

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[3] A number of environmental statutes provide for delegation of federal programs, each of which may be at risk under the Ninth Circuit's opinion. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1344(g)-(k) (providing for delegation of dredge and fill permitting authority); Clean Air Act, 42 U.S.C. § 7661a(d) (providing for delegation of emissions permit program); Safe Drinking Water Act, 42 U.S.C. § 300g-2 (providing for delegation of drinking and groundwater protection); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(d) (providing for delegation of coal mining permitting authority); Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b) (providing for delegation of hazardous waste tracking program); Atomic Energy Act, 21 U.S.C. § 2021(c) (providing for delegation of authority to regulate certain radioactive waste). Under the Ninth Circuit's reasoning, presumably each of these delegations would be subordinated to their interpretation of section 7(a)(2) obligations.

Ninth Circuit's approach requires a finding that section 7 implicitly repeals section 402. This result is reason enough to reverse the Ninth Circuit's decision. The problem is easily avoided by reading section 7(a)(2) as inapplicable to NPDES delegations under section 402, as all other courts have done and as this Court held. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (finding that "when two statutes are capable of co-existence," the courts must "regard each as effective").

That the Ninth Circuit's interpretation of section 7(a)(2) creates this conflict, and thereby requires the conclusion that section 7(a)(2) repeals by implication the mandate set forth in section 402(b), argues for reversal. In *TVA v. Hill*, the Court noted that "repeals by implication are not favored." 437 U.S. at 189 (quoting *Morton v. Mancari*, 417 U.S. at 549) (internal quotation marks omitted). Indeed, to find a repeal by implication, "the intention of the legislature to repeal must be clear and manifest." *Id.* (internal quotation marks and citation omitted). The Court summed up the "cardinal rule" as follows:

> [I]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are *irreconcilable*.

Id. at 190 (internal quotation marks and citation omitted) (emphasis added). *See also Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

In the absence of any express statement by Congress that section 7(a)(2) was intended to repeal section 402, the Ninth Circuit should have looked for a means of avoiding conflict and reconciling the statutes. It did not. Neither the ESA nor its legislative history provides any basis for concluding that Congress intended implicitly to repeal a separate legislative mandate, and the doctrine of repeal by implication does not permit such an interpretation.

Indeed, FWS's regulatory construction of section 7(a)(2) reconciles the ESA with the CWA, as well as other statutes that mandate or constrain federal agency action. Yet, rather than affording deference to the agency's interpretation of section 7(a)(2), the Ninth Circuit simply interpreted the FWS regulation as synonymous with the statute it construes. *Defenders*, 420 F.3d at 969 ("In sum, we understand our cases applying the 'discretionary . . . involvement' regulation to interpret that regulation to be coterminous with the statutory phrase limiting section 7(a)(2)'s application to those cases 'authorized, funded, or carried out' by a federal agency."). The Ninth Circuit therefore transformed a statutory scheme from one that was fully reconcilable—and fully consistent with FWS's reasonable construction—into one that directly conflicts with the CWA.

This conflict can and should be avoided. Because the ESA and the CWA are easily reconciled, the ESA should not be construed in a way that necessarily requires a finding of repeal by implication. The Ninth Circuit's approach requires such a finding, and that finding is plainly not supported by the law.

D. Remand Is Inappropriate; FWS's Interpretation of Section 7(a)(2) Is Entitled to Deference

There is no reason to remand this case to EPA. This issue is clearly presented and appropriate for judicial resolution. Remand will only serve to delay and potentially confuse ultimate resolution of the important legal issues presented by this case.

Remand will not resolve the key issue in this case—the proper construction of section 7(a)(2) and whether it applies to section 402 transfer decisions. The answer to that question ultimately turns on FWS's interpretation of section 7(a)(2), not EPA's interpretation. FWS is the agency responsible for implementing section 7(a)(2). FWS has consistently interpreted section 7(a)(2) as inapplicable to non-discretionary federal action. FWS interprets section 7(a)(2) to apply "to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added.) *See also Defenders*, 420 F.3d at 953 (quoting FWS biological opinion to EPA) ("[T]he absence of the section 7 process that exists with respect to Federal [CWA] permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the [CWA].") Because FWS is the agency responsible for implementing the ESA, FWS's interpretation of the scope of section 7(a)(2) is entitled to substantial deference. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (stating that deference is accorded "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess

whatever degree of discretion the ambiguity allows." (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

Although EPA may have vacillated in its understanding of whether section 7(a)(2) was applicable to section 402 transfer decisions in its review of Arizona's transfer request, *see Defenders*, 420 F.3d at 959-62, EPA ultimately resolved the issue consistently with FWS's interpretation. EPA is not the agency to which courts should defer on an interpretation of section 7(a)(2). Remanding the case to EPA will not answer that question. EPA's obligations under section 402 of the CWA appear undisputed by the Ninth Circuit or any party. Nor does the issue whether section 402 transfer decisions are mandatory appear to be challenged; the Ninth Circuit's decision addresses the proper interpretation of section 7(a)(2) of the ESA, not section 402 of the CWA. Thus, a remand for EPA to consider its interpretation of section 402 serves no purpose. The issue is whether EPA can decide that the ESA obligates it to add criteria not enumerated by Congress for NPDES transfer decisions contrary to the interpretation of section 7(a)(2) by the primary agency responsible for administering the statute. That is a question for this Court to resolve based upon FWS's interpretation. EPA's position on the applicability of section 7(a)(2) to section 402(b) transfer decisions is irrelevant, and remand to that agency serves no purpose.

E. The Practical Effects of *Defenders* Are Potentially Grave for Water Purveyors in the Western United States

If the Ninth Circuit's opinion is allowed to stand, the consequences for WUWC members are potentially dire. One

potential effect is the withdrawal of EPA approval under section 402 of the CWA for any already-delegated program for which section 7(a)(2) consultation was not conducted. The Ninth Circuit's conclusion—that sufficient agency discretion exists in the transfer approval process to consider the effects of the action on species and critical habitat—may be expanded to apply equally to EPA's ongoing oversight of the state-run NPDES programs. EPA might then be forced to re-assume permitting authority under section 402(a), despite the lack of funds and resources to absorb these programs.[4] Such a result could affect every state in which WUWC members operate. Far from the cooperative federalism Congress contemplated in section 402, the resumption of federal permitting by EPA would create undesirable administrative delays and jeopardize the potential for comprehensive water planning throughout the western states by disrupting the regulation and management of wastewater treatment facilities.

Further, the likelihood of litigation against both individual permits and permit programs cannot be overstated. If the Ninth Circuit decision is allowed to stand, the courts will most likely confront lawsuits seeking to enjoin future delegation of NPDES permitting authority, as well as already delegated state-administered programs and existing permits. Indeed, several challenges to state-issued 402 permits are already underway or threatened based on the alleged failure to comply with section 7(a)(2) of the ESA. *See, e.g.*,

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[4] The situation in Arizona is illustrative. As noted by FWS in its biological opinion to EPA regarding the transfer of NPDES permitting to the Arizona Department of Environmental Quality ("ADEQ"), EPA's Region 9 has only two full-time staff involved in permitting, planning, and coordination activities for Arizona, while ADEQ has ten staff assigned to water permitting, and is in the process of hiring nine more.

Oregon Natural Res. Council v. Hallock, et al., Civil No. 02-1650-CO, 2006 WL 1142223, *8 (D. Or. Apr. 24, 2006) (challenging NPDES permit issued by Oregon Department of Environmental Quality, alleging failure to comply with section 7(a)(2)); *National Wildlife Federation, et al.*, Notice of Intent to Sue for Violation of Endangered Species Act—Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Department of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 3 (Apr. 19, 2006), *available at* http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/Nofl001.pdf (last visited Feb. 5, 2007).

Finally, the precedent established by the Ninth Circuit could very well cause the ESA to be applied to the many laws, treaties, and agreements that determine how water will be allocated and, in some cases, used in western states. Those laws, treaties, and contracts are, like the transfer of NPDES authority under section 402, mandatory; they dictate how water from rivers and other sources will be allocated among various users. The urban, residential, and agricultural sectors of much of the west are dependent upon these long-settled water allocation schemes. In many cases, the allocation decisions mandated by these authorities have ESA implications. If the ESA trumps the mandatory elements of the CWA, as the Ninth Circuit has ruled, then these critically important water rights authorities may also be vulnerable to legal challenge for failure to comply with section 7(a)(2). Opening these authorities to ESA application would have highly disruptive and adverse social, economic, and environmental consequences throughout the west. Such an outcome confirms the reasons why section 7(a)(2) must be limited to discretionary agency actions.

WUWC members have devoted considerable resources—and must continue to do so—to meet growing water demands in the western United States. These commitments depend on stability and certainty in the regulatory process and the allocation of water rights. The Ninth Circuit's opinion will likely impact existing and future permits, not only under the NPDES program, but also under other federal statutes containing a congressional mandate to delegate authority to states, and potentially any water-related legal authority that affects species listed under the ESA. This Court should avoid these negative consequences by overturning the Ninth Circuit decision.

CONCLUSION

For the foregoing reasons, amicus curiae WUWC respectfully requests this Court to reverse the Ninth Circuit's decision in *Defenders*. The Ninth Circuit's opinion unnecessarily pits the ESA against other programmatic federal statutes and water allocation authorities by holding that the ESA implicitly overrides other legal mandates. The Ninth Circuit's holding is unnecessary; it is contrary to existing law; and it will lead to uncertainty for any party (including the members of WUWC) that depends upon reliability and predictability in federally-delegated permitting programs.

Respectfully submitted,

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